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# Custom and Military Common Law

## A Retrospective Inquiry into the Operation of Service Custom under the American Military General Articles

by

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TABLE OF CONTENTS

I. INTRODUCTION. . . . . 1

II. THE EVOLUTION AND PRESERVATION OF MILITARY COMMON LAW. . . . . 12

A. Characteristics of a Common Law System of Criminal Law. . . . . 12

B. The British Origins of Military Common Law. . . . . 15

1. The Antiquity of Military Common Law. . . . . 15

2. The First General Articles. . . . . 24

3. The Impact of Seventeenth Century Constitutional Developments. . . . . 28

C. The American General Articles . . . . . 36

1. The Articles of War . . . . . 36

2. The Articles for the Government of the Navy . . . . . 40

3. The Enactment of the Uniform Code of Military Justice. . . . . 45

III. CUSTOM AND THE DEVELOPMENT OF GENERAL ARTICLES LAW. . . . . 50

A. Custom as a Source of Military Law. . . 50

B. Prejudicial Conduct . . . . . 58

1. Origins in Military Custom. . . . . 58

2. The Scope of Prejudicial Conduct. . 64

3. Custom and Deference in the Expansion of Prejudicial Conduct. 78

C. Unbecoming Conduct. . . . . 93

1. Customary Standards of Officer Conduct . . . . . 93

2. The Emergence of the Unbecoming Conduct Concept. . . . . 96

3. The Scope of Unbecoming Conduct. . . 108

D. Service Discrediting Conduct . . . . . 116

IV. THE ROLE OF CUSTOM UNDER THE UNIFORM CODE OF MILITARY JUSTICE . . . . . 122

A. The Two Meanings of Custom . . . . . 122

B. Custom Confused: Legal Custom and the Per Se Characterization of General Articles Misconduct. . . . . 123

C. Custom Restored: The Return to Societal Custom. . . . . 134

D. Custom and Novel Offenses. . . . . 142

V. CONCLUSIONS. . . . . 152

# I. INTRODUCTION

At the heart of American military law are the general articles[1] of the Uniform Code of Military Justice. Article 134 of the Uniform Code provides:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.[2]

Its companion statute, Article 133, states: "Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct."[3]

Together, these two statutes incorporate into the Uniform Code a common law system of military criminal law. Article 134 prohibits two general classes of misconduct

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[1]In this thesis the phrase "general articles" refers to both Articles 133 and 134 and their antecedents. Contemporary usage in the military generally limits "general article" to Article 134. However, "general articles" is more accurate since Articles 133 and 134 share common origins and functions in military law and are both statutory expressions of a system of military common law.

[2]Art. 134, U.C.M.J., 10 U.S.C. sec. 934.

[3]Art. 133, U.C.M.J., 10 U.S.C. sec. 933.

that have been prosecuted by courts-martial for centuries: conduct prejudicial to good order and discipline, known in contemporary legal jargon as "clause (1) offenses"; and service-discrediting conduct, commonly known as "clause (2) offenses". Article 133 forbids a third general class: "unbecoming" conduct on the part of officers.

Article 134, under its "crimes and offenses not capital" clause, also acts as an assimilative crimes statute, under which violations of federal law not specifically covered by one of the punitive articles of the Uniform Code may be prosecuted. Such "clause (3)" prosecutions may also include violations of state criminal statutes assimilated into the U.S. Code by the Federal Assimilative Crimes Act of 1948.[4] While prosecutions under this third clause of Article 134 can pose interesting and complex issues such as the maximum punishment[5] and the extent to which similar but not identical provisions in the Uniform Code preempt prosecutions of "crimes and offenses not capital",[6] this application of Article 134 is fundamentally different from the other three classes of general articles offenses, and is therefore outside the immediate

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[4] 18 U.S.C. sec. 13.

[5] See, e.g., United States v. Walter, 20 C.M.A. 367, 43 C.M.R. 207 (1971); United States v. Picotte, 12 C.M.A. 196, 30 C.M.R. 196 (1961).

[6] See, e.g., United States v. Wright, 5 M.J. 106 (C.M.A. 1978); United States v. Jones, 5 M.J. 579 (A.C.M.R. 1978); United States v. Sellars, 5 M.J. 814 (A.C.M.R. 1977).

scope of this thesis.

Exactly what specific conduct does the vague language of Articles 133 and 134 forbid? Couched as they are in terms of discipline, discredit, and standards expected of officers and gentlemen, Articles 133 and 134 seem to have a substantive reach that extends beyond perceptible legal horizons. The current edition of the Manual for Courts-Martial[7] lists more than seventy different offenses punishable under Article 134 alone.[8] These range from abusing a public animal to wrongful cohabitation, and include offenses carrying substantial penalties.[9] Moreover, the Manual's enumeration of Article 133 and 134 offenses is by no means all-inclusive. Over the years military courts have recognized a number of "novel offenses" not mentioned in the Manual, involving such diverse misconduct as selling whiskey at an unconscionable price to an enlisted man,[10]

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[7]Manual for Courts-Martial, United States, 1969 (Revised) [hereinafter cited as M.C.M., 1969 (Rev.)].

[8]See the Table of Maximum Punishments and the form specifications, M.C.M., 1969 (Rev.), para. 127c, at 25-15 through 25-17, and app. 6c, at A6-20 through A6-26. The Manual mentions only ten examples of Article 133 offenses. Id., para. 212, at 28-70 through 28-71, and app. 6c, at A6-20.

[9]E.g., assault with intent to commit murder or rape (20 years confinement); burning with intent to defraud (10 years); wrongful possession, sale, transfer, use, or introduction of habit-forming narcotic drugs (10 years). See Id., para. 127c, at 25-15 through 15-17.

[10]United States v. Kupfer, 9 C.M.R. 283 (A.B.R. 1953), aff'd, 3 C.M.A. 478, 13 C.M.R. 34 (1953).

cheating at cards,[11] having an extramarital affair,[12] operating a dishonest bingo game,[13] and sexual acts with a chicken.[14]

It is not surprising, then, that the antecedents of Article 134 have been referred to by soldiers as "the Devil's Article"[15] and by sailors as "the captain's cloak".[16] One of the pioneer commentators on American military law, William C. DeHart, writing in 1846 about conduct unbecoming an officer, noted--as have countless other scholars, lawyers, and court-martial members since then--that the concept "from the want of a uniform understanding of its intention, spirit, and authority, has occasioned frequent perplexity in the deliberations of courts-martial, and a consequent diversity in their decisions."[17] As early as 1857 the Supreme Court entertained

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[11] United States v. West, 16 C.M.R. 587 (A.F.B.R. 1954), petition for review denied, 4 C.M.A. 744, 20 C.M.R. 398 (1954).

[12] United States v. Alcantara, 39 C.M.R. 682 (A.B.R. 1968), aff'd, 18 C.M.A. 372, 40 C.M.R. 84 (1969).

[13] United States v. Holt, 7 C.M.A. 617, 23 C.M.R. 81 (1957).

[14] United States v. Sanchez, 11 C.M.A. 216, 29 C.M.R. 84 (1960).

[15] G. Davis, A Treatise on the Military Law of the United States 473, n. 1 (1898).

[16] J. Snedeker, Military Justice Under the Uniform Code 899 (1953).

[17] W. DeHart, Observations on Military Law and the Constitution and Practice of Courts Martial 369 (New York 1846).

an attack on the Navy's general article on the grounds of unconstitutional vagueness.[18]

In this century, as civilian and military courts began to apply certain of the provisions of the Bill of Rights to court-martial defendants[19] and as the void-for-vagueness doctrine developed in civilian courts,[20] criticism of the general articles' apparent vagueness became more pronounced. Some commentators likened the general articles to a "Catch 22".[21] Article 134 was described as "as study in vagueness",[22]

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[18] Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857).

[19] For the most comprehensive account of this development, see Sherman, The Civilianization of Military Law, 22 Maine L. Rev. 3 (1970). Such a perceived "civilianization" of military law, particularly in procedural matters, has also sparked sharp opposition, such as that expressed in Westmoreland and Prugh, Judges in Command: The Judicialized Uniform Code of Military Justice in Combat, 3 Harv. J. L. & Pub. Pol'y. 1 (1980).

[20] See generally, Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970); Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67 (1960).

[21] See, e.g., Note, Uniform Code of Military Justice--The General Article is Unconstitutionally Vague and Overboard, 18 St. Louis L.J. 150 (1973); Note, Taps for the Real Catch-22, 81 Yale L.J. 1518 (1972). The "Catch-22" analogy comes from Joseph Heller's novel of the same name:

> "We accuse you also of the commission of crimes and infractions we don't even know about yet. Guilty or innocent?"
> "I don't know, sir. How can I say if you don't tell me what they are?"
> "How can we tell you if we don't know?"

J. Heller, Catch-22 395 (Dell ed., 1970).

[22] Everett, Article 134, Uniform Code of Military Justice--A Study in Vagueness, 37 N. Car. L. Rev. 142 (1959). Mr. Everett is currently the Chief Judge of the U.S. Court of Military Appeals.

"elemental confusion",[23] and "an unrestricted anachronism".[24] By the early 1970s even persons who could fairly be considered friends of the military justice system began to call for the repeal of Articles 133 and 134. In Justice Under Fire, a generally favorable survey of military justice, Joseph W. Bishop, Jr., offered the following typical friendly criticism of the general articles:

> Constitutional or not, the general articles in their present form seem at best unnecessary. There is no need to punish ungentlemanly conduct as a crime, even if there were universal agreement on standards of conduct among gentlemen. If an officer displays traits of character which make him unfit to command--and it may be remarked in passing that Alexander, Julius Caesar, and Napoleon were none of them paragons of veracity, chastity, and sobriety--he can be eliminated from the service without being convicted of crime. The genuine crimes usually charged under the general articles could as easily, and with much clearer constitutionality, be covered by explicit articles of the Code. One such article, for example, might simply replace the "crimes not capital" clause of Article 134 by incorporating by reference the federal penal code. If Congress wants to court-martial military personnel who indulge in cheating at cards or indecent acts with children (with a service connection), it might just as well say so explicitly, whether or not the courts compel it to do so.[25]

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[23] Hagan, The General Article--Elemental Confusion, 10 Mil. L. Rev. 63 (1960).

[24] Comment, The Discredit Clause of the UCMJ: An Unrestricted Anachronism, 18 U.C.L.A. L. Rev. 831 (1971).

[25] J. Bishop, Justice Under Fire 90-91 (1974). See also, Hodson, Perspective: The Manual for Courts-Martial --1984, 57 Mil. L. Rev. 1, 12 (1972). Major-General Hodson was, at the time, Chief Judge of the U.S. Army Court of Military Review.

In 1974 the Supreme Court decided the vagueness issue in Parker v. Levy,[26] upholding the general articles against vagueness and overbreadth challenges.

Captain Levy was an Army doctor assigned to train Special Forces medical aides. He refused to perform this duty because he opposed American military operations in Vietnam, where the aides would serve. Instead he made a number of anti-war statements to enlisted personnel at his post, saying, among other things, that if he were a black soldier he would refuse to go to Vietnam and that Special Forces personnel were liars, thieves, killers of peasants, and murderers of women and children. Levy was convicted by a general court-martial of making a disloyal statement, in violation of Article 134, and of conduct unbecoming an officer arising from those statements, in violation of Article 133.[27] He was sentenced to dismissal from the service, forfeiture of all pay and allowances, and confinement at hard labor for three years.

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[26] 417 U.S. 733 (1974). Parker v. Levy is one of the most important military law cases ever decided. Not only did it resolve the vagueness issue, but it also announced a distinctly military rule of standing to challenge punitive articles of the Uniform Code on the grounds of vagueness or overbreadth. The court held that Levy lacked standing to challenge the facial vagueness and overbreadth of Articles 133 and 134, notwithstanding their direct burden on First Amendment rights, because they were neither vague nor overbroad as applied to his disloyal statements.

[27] The lengthy specifications upon which Captain Levy was tried are set out in a footnote to the Court's opinion. Id. at 738, n. 5, and 739, n. 6.

After numerous appeals within the military justice system and in civilian courts,[28] the Third Circuit invalidated his conviction, holding that Articles 133 and 134 were, on their face, unconstitutionally vague and overbroad "as measured by contemporary standards of vagueness applicable to statutes and ordinances governing civilians."[29]

The Supreme Court, per Justice Rehnquist, reversed in a decison that rested upon several important assumptions about the nature and operation of the general articles in military law, and about the military justice system generally.

The starting point for Justice Rehnquist's analysis was the invocation of the "separate society" tradition, a historic view of the military as being "by necessity a specialized society, separate from civilian society."[30] The military exists to fight wars; therefore its society is governed by values, traditions, and needs that are distinct from, and to large extent irrelevant in American civilian society. Moreover, as the military is a separate society,

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[28]United States v. Levy, 39 C.M.R. 672 (A.B.R. 1968), petition for review denied, 18 C.M.A. 627 (1969): Levy v. Corcoran, 389 F.2d 929 (1967), application for stay denied, 387 U.S. 915 (D.C. Cir. 1967), cert. denied, 389 U.S. 960 (1967); Levy v. Resor, 17 C.M.A. 135, 37 C.M.R. 399 (1967); Levy v. Resor, 384 F.2d 689 (4th Cir. 1967), cert. denied, 389 U.S. 1049 (1968); Levy v. Dillon, 286 F. Supp. 593 (D. Kan. 1968), aff'd, 415 F.2d 1263 (10th Cir. 1969).

[29]Levy v. Parker, 478 F.2d 772 (3rd Cir. 1973).

[30]Parker v. Levy, 417 U.S. at 743.

so too military law "is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment."[31]

An even more significant premise, for purposes of this thesis, was the restrictive role seen for custom of the service in defining general articles law. Over the years the military has developed what "may not unfitly be called the customary military law",[32] under which, has since at least the seventeenth century, offenses now cognizable under the general articles of the Uniform Code have been prosecuted.[33] Long-standing customs and usages "impart accepted meaning to the seemingly imprecise standards" of the general articles.[34] In short, custom, operating within a common law type of system of military justice has limited the apparent sweep of the general articles. They are "gauged by an actual knowledge and experience of military life, its usages and duties."[35] Moreover, military case law has, according to Justice

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[31] Id. at 744, quoting Burns v. Wilson, 346 U.S. 137, 140 (1953).

[32] Parker v. Levy, 417 U.S. at 744, quoting Martin v. Mott, 25 U.S. (12 Wheat.) 19, 35 (1827).

[33] See Parker v. Levy, 417 U.S. at 745-46 for a brief discussion of the British and early American antecedents of the general articles.

[34] Id. at 746-47.

[35] Id. at 749, quoting Swaim v. United States, 28 Ct. Cl. 173, 228 (1893).

Rehnquist, had two effects on the substantive scope of the general articles: "It has narrowed the very broad reach of the literal language of the articles, and at the same time has supplied considerable specificity by way of examples of the conduct which they cover."[36] Justice Rehnquist thus viewed custom and legal precedent as complementary limiting forces; to the extent that case precedent has not defined the general articles, their scope has been defined and limited by custom and usage.[37]

This thesis will examine the role of custom in the development of military general articles law. The principal thrust of the inquiry is historical for two reasons. First, Anglo-American military law began as the enforcement of military and naval discipline, as embodied in the ancient and customary "laws of war" and "laws of the sea". Over the intervening eight centuries, Anglo-American military law has retained what are essentially military common law offenses through the general articles of the military penal codes.

The second reason for a retrospective approach is that during the formative years of American general articles law, from the Civil War until World War I, custom was invoked in a common law fashion to extend the substantive reach of the general articles by recognizing new

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[36] Parker v. Levy, 417 U.S. at 754.

[37] Id. citing Dynes v. Hoover, 61 U.S. (20 How.) 56, (1857).

offenses. By 1920 modern general articles law had emerged.

After tracing the historical development of the three classes of general articles offenses, the thesis will consider the operation of custom in general articles law since the enactment of the Uniform Code of Military Justice. Case law and precedent have had some limiting effect on the scope of the general articles; but, since 1957, the expansive effect of service custom has been rejeuvenated somewhat by the return to the historic practice of treating the applicability of a general article to the accused's specific misconduct as a factual issue to be decided at trial.

## II. THE EVOLUTION AND PRESERVATION OF MILITARY COMMON LAW

### A. Characteristics of a Common Law System of Criminal Law

Although Anglo-American systems of military justice have been based on statutes such as the Uniform Code of Military Justice since the late seventeenth century, the general articles of the various military codes have retained an ancient body of customary military law that operates much like a common law system of criminal law. Indeed, the phrase "military common law" is not an inaccurate description of the way that the general articles have operated within the larger statutory framework of military law.[38] Two fundamental characteristics of a common law system of crimes make this description appropriate: the use of custom as a source of substantive criminal law, and the recognition of new crimes at common law.

Common law crimes arose from custom. Rollin Perkins, perhaps the foremost modern commentator on criminal law, has pointed out that "By usage and custom certain rules come to be accepted both for settling ordinary disputes

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[38]Hagan, supra note 23, at 63.

or controversies between man and man and for dealing with those who commit misdeeds of a seriously antisocial nature."[39] The antiquity of a customary characterization of certain conduct as injurious to a societal interest itself provides authority for enforcing that custom with penal sanctions.[40] Even though its origins are lost in the mists of antiquity, custom derives its force "from the fact that it has existed and been accepted as the law from time immemorial."[41] What constitutes criminal conduct is thus determined by custom, as evidenced by legal tradition and precedent, scholarly commentary, and treatises.[42]

Custom, although ancient, is not static.[43] Interwoven with custom, and to a considerable extent shaping its use, are the legal and societal contexts in which it is

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[39] R. Perkins, Criminal Law 24 (2d ed. 1969).

[40] Blackstone found that the force of the common law "rests entirely upon general reception and usage; and the only method of proving that this or that maxim is a rule of the common law, is by showing that it hath been always the custom to observe it." 4 Blackstone's Commentaries *68, quoted in R. Perkins, supra note 39.

[41] W. Clark, Handbook of Criminal Law 17-18 (2d ed. 1902).

[42] W. Clark and W. Marshall, A Treatise on the Law of Crimes 23-24 (5th ed. 1952).

[43] Rollin Perkins has written: "Courts are constantly required to pass upon new problems, partly due to changing social and economic conditions. They are required to decide what is the common law as applied to these new problems and in this way they make constant additions to the field...Hence the common law is a constantly growing body of material." R. Perkins, supra note 39, at 25.

applied, as well as ethical and moral principles and public policy considerations.[44] This leads to the second important attribute of a common law system of criminal law; the judicial recognition of new common law offenses, i.e., conduct not hitherto criminally punished. This process is essentially one of effects analysis, and was described by William L. Clark in language suggestive in tone of that in Article 134 of the Uniform Code: "The common law punishes acts tending to a breach of the public peace, acts injurious to the public morals, and acts having certain other tendencies. Any acts, therefore, which have such effect are prohibited by the common law."[45] The test, then is not just one of legal precedent, but whether, apply customary values and norms, the conduct injuriously affects public policy or economy.[46]

As this thesis now turns to a historical analysis of the general articles offenses, these two important characteristics of a common law system--the reliance on and enforcement of custom, and the elasticity of the substantive limits of military common law provided by the

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[44] See J. Gray, The Nature and Sources of the Law 87-88 (1909); see generally E. Patterson, Jurisprudence: Men and Ideas of the Law 212-17 (1953).

[45] W. Clark, supra note 41, at 22.

[46] E. McClain, A Treatise on the Criminal Law as Now Administered in the United States 19-20 (1897). McClain expressed the test simply: "All crimes that injuriously affect public society are indictable at common law." Id. at 19, n. 5.

recognition of novel general articles offenses--will serve as marker threads running intertwined through the development of military common law from early times to the present.

B. The British Origins of Military Common Law

1. The Antiguity of Military Common Law

The modern American military justice system is the product of more than 800 years' development, during which military law has retained at its core attributes and values of the system of customary law from which it emerged in the twelfth century. Although some scholars have traced the substantive origins of modern military law to Phoenician,[47] Roman,[48] and Frankish[49] sources, the earliest clearly identifiable appearance of the system of customary military law now embodied in Articles 133 and 134 of the Uniform Code was in medieval England.

British military legal history is essential to an understanding of contemporary American military law in this

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[47] See J. Stephens, C. Gifford, and F. Smith, Manual of Naval Law and Court Martial Procedure 14 (4th ed. 1912) [hereinafter cited as J. Stephens et al.] ; see generally W. McFee, The Law of the Sea 33-66 (1951).

[48] See G. Davis, supra note 15, at 13; Graynor, Prejudicial and Discreditable Military Conduct: A Critical Appraisal of the General Article, 22 Hastings L.J. 259, 260 (1971).

[49] See W. Winthrop, Military Law and Precedents 17-18 (2d ed. 1896) (1920 reprint). Pagination cited is that of the 1920 reprint, which is more commonly shelved in law libraries than the 1896 printing.

area. Although one major nineteenth century American commentator, William C. DeHart, seemed to dismiss British precedents and legal history as irrelevant to American military law,[50] that view has been almost universally rejected. The first American military codes were deliberately patterned after contemporary British military articles, with large portions of the British models being adopted verbatim by the Continental Congress.[51] British military law, including that of the post-Revolutionary period, had a marked influence on the development of American military law in the nineteenth century.[52]

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[50] W. DeHart, supra note 17, at 1. Notwithstanding his dismissal of British military precedent, DeHart relied on British military law in discussing conduct unbecoming an officer. Id. at 375-76.

[51] E. Byrne, Military Law 4-8 (2d ed. 1976). Frederick Bernays Wiener has pointed out: "It must never be forgotten that the men of the American revolution were revolutionary only to a point; they retained the English language, they retained the English common law, they shaped their legislative institutions after English models, while in military matters they not only retained intact the English hierarchy of rank, from private to general, but copied verbatim the English articles of war." Wiener, Are the General Military Articles Unconstitutionally Vague?, 54 A.B.A.J. 357, 358 (1968).

[52] Nineteenth century American military law treatises devoted significant attention to British antecedents and precedents. See, e.g., G. Davis, supra note 15, at 3-14, 468; W. Winthrop, supra note 49, at 18-21. British military cases were also consulted and considered authoritative on some issues. See, e.g., Smith v. Whitney, 116 U.S. 167, 184-85 (1886).

Military law developed as separate but similar systems of army and naval law.[53] In both services, however, the historical purpose of military law was the preservation of discipline. One scholar of naval history has summarized the absolute importance of discipline as follows:

> The governing of a fighting force throughout history has had a general continuity through acceptance of the theory that military success lies in having a fighting body of men respond as a unit in applying its force to an enemy...To compel obedience, to insure cohesion and integrity of the fighting unit was seen as the function of military law and discipline.[54]

Indeed, the feature of military law that made it a separate system of jurisprudence has been its bedrock value of the preservation of discipline. General C. J. Napier, writing in 1837, distinguished military law from civilian law on the basis of military law "having for its object to make the will of a single man the paramount rule" while civilian law had for its purpose "to prevent the will of a single man being the rule."[55] The critical importance of

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[53]Before the enactment of the Uniform Code--and even today in Great Britian--"military law" referred strictly only to the army court-martial system, with the navy's system being known as "naval law". In this thesis, however, "military law" will be used in its modern American sense, referring to the army and naval systems together.

[54]J. Van Slate, A History of Naval Military Law 2 (September 1971)(unpublished LL.M. thesis; George Washington University). Captain Van Slate's thesis contains an outstanding exposition of the role of discipline in military law at 2-13.

[55]C. Napier, Remarks on Military Law 5 (1837), quoted in J. Van Slate, supra note 54, at 5.

discipline in the military, caused General W. T. Sherman to state that military and civilian societies are "as wide apart as the poles, and each requires its own separate system of laws--statute and common."[56]

Even since the enactment of the Uniform Code of Military Justice in 1950, the enforcement of discipline remains a principal justification for a separate system of military justice. The drafters of the Uniform Code considered it to be a fair compromise between the traditional function of preserving discipline and the post-World War II desire to introduce civilian concepts of procedural justice to prevent abuses.[57] The ancient role of military law, however, remains its raison d'etre. As Robinson O. Everett, now Chief Judge of the U.S. Court of Military Appeals, wrote in 1956:

> Military justice is a system of law created to enforce certain standards of behavior--some of them identical with standards enforced in civilian life--which have importance in maintaining discipline in the Armed Forces and public respect for those Forces. The administration of the system is placed in the hands of military courts of one type or another chiefly for two reasons. One is that to do so is more convenient and in some situations is the only feasible alternative. The other is that these military courts are closer to

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[56] W. Sherman, Military Law 130 (1880), quoted in J. Van Slate, supra note 54, at 5.

[57] Uniform Code of Military Justice: Hearings on S. 857 and H.R. 4080 Before a Subcommittee of the Senate Comm. on Armed Services, 81st Cong., 1st Sess. 49 (1949) (testimony of Edmund Morgan) [hereinafter cited as Senate Hearings].

the problems of maintaining discipline and assessing appropriate punishment than a civil court would be.[58]

Long before the first written military penal codes appeared in Britain, discipline and order were enforced according to the customs and traditions of martial and naval discipline. Great authority reposed in the commanding officer, who administered and enforced discipline in a somewhat summary fashion, as had been the custom since Roman and Teutonic times.[59] Under ancient maritime custom English sailors, whether in the merchant fleet or in the King's service, were subject to virtually life-and-death disciplinary authority vested in their commanders.[60]

Written military codes did not appear in England until the close of the twelfth century. The first British

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[58] R. Everett, Military Justice in the Armed Forces of the United States 7 (1956). A number of commentators have recently published thoughtful challenges to the continued primacy of discipline in military law. See, e.g., Zillman and Imwinkelried, Constitutional Rights and Military Necessity: Reflections on the Society Apart, 51 Notre Dame Law. 396 (1976); Comment, Military Discipline and Political Expression: A New Look at an Old Bugbear, 6 Harv. C.R.-C.L. L. Rev. 525, 537-44 (1971); Sherman, supra note 19, at 78-85.

[59] W. Winthrop, supra note 49, at 17.

[60] J. Stephens et al., supra note 47, at 1-4. Even as relatively recently as the early nineteenth century, an American sailor remarked: "No monarch in the world is more absolute than the captain of a man-of-war." G. Brooks, ed., James Durand: An Able Seaman of 1812 18 (1926), quoted in J. Van Slate, supra note 54, at 4.

code was the ordinance promulgated by Richard I in 1190[61] to govern his fleet on its expedition in the Crusades. Its provisions were brief, but severe:

> Richard, by the grace of God, King of England, Duke of Normandy and Aquitaine, and Earl of Anjou, to all his subjects about to proceed by sea to Jersusalem, greeting. Know ye, that we, with the common consent of fit and proper men, have made the enactments underwritten. Whoever shall slay a man on ship-board, he shall be bound to the dead man and thrown into the sea. If he shall slay him on land he shall be bound to the dead man and buried in the earth. If any one shall be convicted, by means of lawful witnesses, of having drawn out a knife with which to strike another, or shall strike another so as to draw blood, he shall lose his hand. If, also, he shall give a blow with his hand, without shedding blood, he shall be plunged in the sea three times. If any man shall utter disgraceful language or abuse, or shall curse his companion, he shall pay him an ounce of silver for every time he has so abused him. A robber who shall be convicted of theft shall have his head cropped after the manner of a champion, and boiling pitch shall be poured thereon, and then the feathers of a cushion shall be shaken out upon him so that he may be known, and at the first land at which the ship shall touch, he shall be set on shore. Witness myself, at Chinon.[62]

A similar code, consisting of 27 articles, was promulgated by Richard II in 1385 for the army. It emphasized conduct that could be considered detrimental to military discipline,

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[61] The ordinance of 1190 was apparently modeled after the Code Nautique d'Oleron issued by Eleanor of Aquitaine, the wife of King Henry II of England, earlier in the twelfth century. The Code Nautique was itself derived from the more ancient customary law of the seas, particularly Rhodian and Phoenician. See Naval Court-Martial Manual (British) vii (1969).

[62] Naval Ordinance of 1190, reprinted in W. Winthrop, supra note 49, app. I, at 903.

such as going on an expedition without permission,[63] abandoning the watch,[64] and granting unauthorized safe conduct and violating an authorized one.[65]

These early ordinances were not intended to be complete catalogues of military offenses and punishments. Instead, it appears that their principal purpose was to give notice to commanders and soldiers and sailors alike of the kinds of misconduct prohibited by the customary law of war and law of the sea. It must be remembered that until

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[63] "XIV. ITEM, that no man go out on an expedition by night or day, unless with the knowledge and by the permission of the chieftain of the battail in which he is, so that they may be able to succour him should occasion require it, on pain of losing horse and armour." Articles of War of 1385, art. XIV, reprinted in W. Winthrop, supra note 49, app. II, at 905.

[64] "XX. ITEM, that every one shall well and duly perform his watch in the army, and with the number of men at arms and archers as is assigned him, and that he shall remain the full limited term, unless by order or permission of him before whom the watch is made, on pain of having his head cut off." Articles of War of 1385, art. XX, reprinted in id.

[65] "XXI. ITEM, that no one shall give passports or safe conduct to a prisoner nor any other, nor leave to any enemy to come into the army, on pain of forfeiture of all his goods to the King, and his body in arrest and at his will; except our lord the King, Monsieur de Lancaster, seneschall, the constable, and marshall: and that none be so hardy as to violate the safe conduct of our lord the king, upon payne of being drawn and hanged, and his goods and heritage forfeited to the King; nor to infringe the safe conducts of our said lord of Lancaster, seneschall, constable, and mareschall, upon pain of being beheaded." Articles of War of 1385, art. XXI, reprinted in id.

the end of the sixteenth century, the British army and navy were not permanent organizations.[66] Instead, when it became necessary to execute a military expedition the Earl Marshall and Lord High Admiral would raise an army and fleet respectively, and would issue, often through the commanders-in-chief, articles providing for army and naval discipline.[67] Although each code was in effect only for a single war or expedition, one would usually be reissued with only minor changes in subsequent wars.[68] As a result of the ad hoc raising of military forces, although there existed a fairly well-defined body of customary army and naval law, most of the soldiers and sailors and even many of the officers in any given expedition were largely ignorant of its provisions. Of course, a prerequisite of effective military discipline was that those under its authority should know what behavior is inconsistent with discipline and order.

Evidence that the primary purpose of these early codes was notice can be found in the requirement that their provisions be read or posted. The practice probably predates the twelfth century, but the ordinance of 1190 included instructions that it be copied out in parchment and nailed to the foremast of each ship in Richard I's

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[66] J. Stephens et al., supra note 47, at 5.

[67] Id.; Manual of Military Law (British) 7-9 (1887).

[68] J. Stephens et al., supra note 47, at 5.

fleet. Since many of the officers and most of the crews were illiterate, it was also to be read monthly at a muster of all hands.[69] The practice has been consistently observed in the British and American military from medieval times to the present.[70]

Early military law was customary law. In the common law tradition, conduct that was injurious to discipline was an offense against military law. The codes merely served to provide notice to those largely unaware of military custom and, in some instances, to provide uniform punishment.

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[69] Naval Court-Martial Manual, supra note 61, at viii.

[70] Henry VIII required similar notice provisions in his Book of Orders for the War by Sea and Land issued in 1532. M. Oppenheim, Administration of the Royal Navy 26 (1896). In 1758 Parliament enacted legislation requiring that the naval articles of 1749 be posted in a public part of each ship, be constantly maintained and revised, and be read once a month in the presence of the officers and crew. 31 Geo. 2, c. 10, sec. 33 (1758). The purpose of these provisions was summarized in 1813 as follows: "Hence, no officer or seaman is allowed to plead ignorance of the penalties and punishments to which he is liable, from neglect or disobedience, nor can be be unacquainted with the encouragements and benefits to which seamen are entitled, by a due and faithful performance of their duty. 1 J. McArthur, Principles and Practice of Naval and Military Courts Martial 44 (4th ed. London 1812). See also W. Winthrop, supra note 49, at 764, concerning origins of similar requirements in army law. The current notice requirements are set forth in Art. 137, U.C.M.J., 10 U.S.C. sec. 937, which provides that the punitive articles of the Code "shall be carefully explained to each enlisted member at the time of his entrance on active duty, or within six days thereafter. They shall be explained again after he has completed six months of active duty, and again at the time when he reenlists. A complete text of the Uniform Code of Military Justice and of the regulations prescribed by the President thereunder shall be made available to any person on active duty, upon his request, for his personal examination."

## 2. The First General Articles

It was not until the early fourteenth century that the first codification of military common law was attempted. In the early 1330s, King Edward III established the Court of Admiralty[71] under Sir John Beauchamp, the first Lord High Admiral. Under his direction, the Inquisition of Queensborough compiled the first codification of naval customary law, "The Ancient Statutes of the Admiralty to be Observed Upon the Ports and Havens, the High Seas, and Beyond the Seas". Compiled between 1337 and 1351, this collection of naval law became known simply as the "Black Book of the Admiralty" because of its black leather binding. Its articles were derived from both contemporary and ancient maritime custom, and from earlier naval codes such as the Code Nautique d'Oleron and the ordinance of 1190.[72] It also contained the first general article in English military law, Article 11, which clearly expressed the customary nature of naval law:

> Item, that no captain or master of ship shall suffer any mariner of his ship to be ill used or beaten, but if any mariner doth trespass or do any thing against the ordinance or law of the sea then the captain or master shall send or bring such mariner offending

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[71] The Court of Admiralty originally exercised exclusive jurisdiction over piracy, prize, and admiralty law; but at no time did it control naval policy, administration, or discipline. Its criminal jurisdiction over piracy was transferred to the Central Criminal Court in 1834, and the court itself was merged into the Probate, Divorce, and Admiralty Division of the High Court of Justice in 1875. Naval Court-Martial Manual, supra note 61, at vii.

[72] Id.

> before the admiral or underadmiral there to undergo and receive what the law and custom of the sea wills and requires.[73]

The Black Book of the Admiralty remained an authoritative source of naval common law for more than three centuries. As late as 1532 the ancient naval punishment of suspension was still being employed.[74] During the English expedition against Cadiz in 1596, the penalty of binding a murderer to his victim and casting him overboard, described in the 1190 ordinance, was still being executed.[75]

When the first general articles appeared in English military codes, they did so in the context of an ancient but active body of military common law. The purpose of the general articles was to act as a savings clause, incorporating military common law into the codes and providing notice that, in addition to the more serious military offenses enumerated in the codes, members of the armed forces were also subject to penal sanctions for misconduct customarily recognized as injurious to discipline.

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[73] 1 Black Book of the Admiralty xxx-xxi (Twiss ed. 1871). The use of the singular form of the verbs "will" and "require" suggests that "the law and custom of the sea" was considered a single, indivisible entity: the law of the sea being maritime custom having the force of law.

[74] M. Oppenheim, supra note 70, at 79. Suspension was imposed for sleeping on watch. The culprit was suspended in a basket from the bowsprit and given a biscuit, a can of beer, and a knife. He was then left to starve or to cut himself down into the sea.

[75] T. Thring and C. Grifford, Criminal Law of the Navy 6-7 (1877).

The first general articles merely invoked custom in general terms. The ordinance of 1625, promulgated by the Earl of Essex and Lord Wimbledon for an expedition against Cadiz, instructed commanders to punish "any other crime or offense" with due severity in the punishment or reformation thereof according to the known orders of the sea."[76] Articles of war issued that same year for the army likewise provided that "All other disorders whatsoever are to be punished, as these formerly nominated."[77]

The 1627 army articles not only indicated that army customary law was to govern, but also suggested the role of the court-martial members, then known as a council of war, in determining whether the accused's conduct was punishable under army custom: "All other abuses and offences not specified in these Orders shall be punished according to the disciplines of warr and opinions of such officers and others as shall be called to make a Councell of Warr."[78]

The articles issued in 1635 by the Earl of Lindsay, in his capacity as Lord High Admiral, likewise vested discretion in the commander to determine whether the accused's actions were contrary to naval customary law:

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[76] J. Corbett, Fighting Instructions, 1530-1816, 29 Navy Records Society 36 (1905).

[77] Nichols, The Devil's Article, 22 Mil. L. Rev. 111, 113 (1963), quoting 5 J. Army Historical Research Soc'y 202 (1926).

[78] Id.

> Secondly: If any under your command in that ship shall be a common swearer, blasphemer, railer, drunkard, pilferer, or sleep at his watch, or make a noise, and not betake himself to his place of rest, after the watch is set, or shall not keep his cabin cleanly, or be discontented with his proportion of victuals, or shall spoil or waste them, or any other necessary provisions for the ship, or shall commit any insolvency or disorder, fitting by you to be corrected, you are to punish them according to the order and custom of the sea.[79]

The Earl Marshall's articles of 1639 provided still another wording, but to the same effect of preserving customary military law:

> In whatever cases or accidents that may occurre, for which there is no speciall order set downe in the lawes here published, there the ancient course of marshall discipline shall be observed untill such time as his Excellence the Lord General shall cause further order to be made and published in the Armie, which shall thence forward stand in force upon the paines therein expressed.[80]

The Earl of Northumberland's general article of 1640 was typical of language used by both Royalist and Parliamentary forces during the English Civil War: "All other faults, disorders and offences, not mentioned in these articles shall be punished according to the general customes and laws of warre."[81] Identical language was used in the articles issued by the Earl of Essex, commander-in-chief of

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[79] Id. (emphasis added).

[80] Id.

[81] Id., quoting 2 F. Grose, Military Antiquities 126 (London 1788).

the Parliamentary army, in 1642,[82] and in the Articles for the Government of the Navy of 1652.[83]

### 3. The Impact of Seventeenth Century Constitutional Developments

The mid-seventeenth century is an important period in the development of both military common law, as embodied in the general articles, and the court-martial system generally. By the mid-seventeenth century general articles were a feature of every British military code. Notwithstanding the profound constitutional changes that would occur in the seventeenth century, military common law and the customs upon which it was based were retained, even though more extensive and detailed military penal codes were issued. Military law in this era retained a strong common law flavor, as was characteristically expressed in the Articles of War of 1643: "Matters, that are clear by the light and law of nature, are presupposed; things unnecessary are passed over in silence; and other things may be judged by the common customs and constitutions of war; or may upon new emergents, be expressed afterwards."[84] Moreover, by 1653 most of the substantive and procedural concepts and institutions that were to govern the British military, and

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[82] See Nichols, supra note 77, at 113; J. Snedeker, supra note 16, at 898.

[83] Id. at 899.

[84] Nichols, supra note 77, at 113, quoting 2 F. Grose, Military Antiquities 137 (London 1788).

which would be adopted by and influence American military law, were identifiable, particularly the authority of the court-martial itself as a judicial organ.[85]

Although Parliament's triumph over the Crown in the seventeenth century changed the constitutional basis of British military law from royal prerogative to statute, it did not curtail the operation of military common law. Military codes issued during the Commonwealth, after the Restoration, and even after the final Parliamentary triumph of 1688, routinely contained general articles authorizing punishment of customary military offenses.[86] Moreover, while Parliament's distaste for Cromwell's military dictatorship resulted in temporary restrictions on the court-martial system immediately after the Restoration, by the end of the seventeenth century Parliament had become content to allow military law to return to flowing relatively unimpeded along its ancient channels.

By 1660 Cromwell's excesses had caused Parliament to regard a standing army as a threat to its authority, and, in a broader sense, to liberty. Thus, during the Restoration, royal authority over military law was at first

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[85]For an excellent summary of the emergence of the court-martial as a judicial organ during this period, see J. Van Slate, supra 54, at 26-40.

[86]The "Prince Rupert Articles" of 1672, which were in effect from March 1672 through February 1674, had no general article and are a curious exception. See G. Davis, supra note 15, at 567 et seq.

sharply curtailed. The Articles for the Government of Guards and Garrisons of 1662, for example, removed felonies from court-martial jurisdiction, requiring that felonies committed by soldiers be tried under civil common law by a special commission convened under the Great Seal and acting with the advice of civilian judges and lawyers.[87] By 1686, Parliament had relented to the extent of fully restoring court-martial jurisdiction to its pre-1660 limits, but required that the Articles of War promulgated by James II that year expressly prohibit infliction of any peacetime punishment amounting to loss of life or limb.[88]

One of the effects of Parliamentary restrictions on the authority of the army to punish its offenders was that by 1688 discipline had deteriorated to alarming depths.[89] After James II was deposed, the lingering threat of a Jacobite insurrection precipitated a restoration of the disciplinary authority of the Crown, subject to Parliamentary assent. In March 1689, 800 soldiers mutinied at Ipswich and marched on London to restore James II.

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[87] Manual of Military Law, supra note 67, at 12.

[88] Id.: "Rules and Articles for the Better Government of His Majesties Land-Forces in Pay", art. LXIV (1686), reprinted in W. Winthrop, supra note 49, app. V, at 928. Winthrop incorrectly dated these articles as 1688, although they were in force in that year. This has resulted in considerable confusion about their date of promulgation. See, e.g., J. Snedeker, supra note 16, at 899.

[89] Manual of Military Law, supra note 67, at 12.

Parliament responded by passing the Mutiny Act of April 3, 1689,[90] so named for its caption "An Act for punishing Officers or Soldiers who shall Mutiny or Desert their Majestyes Service". The Mutiny Act was a remarkable piece of legislation, given the constitutional and political upheavals that England had experienced shortly before its enactment. While expressly recognizing that "the raising or keeping a standing Army within this Kingdome in time of peace unlesse it be with consent of Parlyament is against Law",[91] and that "noe man may be forejudged of Life or Limbe, or subjected to any Kinde of punishment by Martiall Law, or in any other manner than by judgment of his Peeres, and according to the Knowne and Established Laws of this Realme",[92] Parliament expressed the need for extraordinary action:

> Yet, nevertheless, it being requisite for retaineing such Forces as are or shall be raised dureing this exigence of Affaires in their Duty an exact Discipline be observed. And that Soldiers who shall Mutiny or Stirr up Sedition, or shall desert Their Majestyes Service be brought to a more exemplary and speedy Punishment than the usuall forms of Law will allow.[93]

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[90] 1 William & Mary, c. 5. For an account of the mutiny of April 1689, see 1 J. McArthur, supra note 70, at 22-23; Manual of Military Law, supra note 67, at 12.

[91] Mutiny Act of April 1689, 1 William & Mary, c. 5, sec. 1, reprinted in W. Winthrop, supra note 49, app. VI, at 929.

[92] Id., sec. 2.

[93] Id.

The Crown was therefore granted the authority to cause courts-martial to be convened under articles of war promulgated by the sovereign.[94] Such articles already were in effect, those issued by James II in 1686. Thus, Parliament used James II's own rules to defeat his insurrection.

Reflecting the British constitutional abhorrence of a standing army, the original Mutiny Act was enacted for a period of only seven months.[95] However, it was extended in November 1689[96] and would be renewed annually, except for an interruption from April 1698 to February 1701,[97] until 1879, when it was merged with the Articles of War into a single Army Discipline Act.[98]

The Mutiny Act therefore established a three-tiered structure of army substantive law. The constitutional foundation of British army law was no longer royal prerogative, but an act of Parliament. The articles of war,

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[94] W. Winthrop, supra note 49m at 47; G. Davis, supra note 15, at 3. This power was implied in the authorization in section 3 of the Mutiny Act to grant commissions for the convening of courts-martial.

[95] Mutiny Act of April 1689, 1 William and Mary, c. 5, sec. 3.

[96] 1 William and Mary, sess. 2, c. 4 (1689).

[97] 1 J. McArthur, supra note 70, at 23.

[98] 42 & 43 Vict., c. 32 (1879). The annual authorization of the existence of the British Army continued, however, until the passage of the Army Act of May 6, 1955, 3 & 4 Eliz. 2, c. 20. That act was originally effective for only one year, but provided that the Parliamentary authorization for the army could be continued by order of the Privy Council for a period of not more than five years.

issued by the Crown until 1803,[99] set out substantive and procedural military law and constituted the second tier. The third tier was the ancient military common law, which was incorporated into the articles of war by general articles, such as that issued by George II in 1765:

> All Crimes not Capital, and all Disorders or Neglects, which Officers and Soldiers may be guilty of, to the Prejudice of good Order and Military Discipline, though not mentioned in the above Articles of War, are to be taken Cognizance of by a Court-Martial, and be punished at their Discretion.[100]

Parliament treated naval law somewhat differently. Once Parliament gained control of the British navy during the Interregnum, it never returned it to the Crown. During the Commonwealth, the Navy was managed directly by a Parliamentary committee, which in April 1645, promulgated "An ordinance and articles concerning martial law for the government of the navy", enumerating a number of specific offenses and directing punishment of unspecified naval offenses according to the "known orders and customs of the sea". From 1648 through 1653 Parliament gradually returned some administrative powers to the admirals, but kept the

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[99] Commencing in 1803 army articles of war were issued by act of Parliament. 53 Geo. 3, c. 17, sec. 146 (1803).

[100] Rules and Articles for the Better Government of Our Horse and Foot Guards, and All Other Our Forces in Our Kingdoms of Great Britain and Ireland, Dominions Beyond the Seas, and Foreign Parts, sec. XX, art. III (1765), reprinted in W. Winthrop, supra note 49, app. VII, at 946 [hereinafter cited as Articles of War of 1765], The Articles of War of 1774 had a similarly worded general article. See G. Davis, supra note 15, at 567.

navy on a fairly short leash.[101] After the Restoration, Parliament confirmed the Crown's general authority over the navy,[102] but naval administration and discipline were to be governed, except in mundane matters, by legislation. Thus, the "Articles and Orders for the Regulation and better Government of his Majesty's Navies, Ships of War, and Forces by Sea" of 1661[103] and all subsequent naval codes were enacted by Parliament, not issued by royal decree.

The British navy was thus governed by a two-tiered system of substantive law: the naval articles enacted by Parliament and the customary naval offenses retained by the general articles of those codes. Article 33 of the 1661 code, for example, provided that "all other faults, misdemeanors, and disorders committed at sea, not mentioned in this act shall be punished according to the laws and customs in such cases used at sea."[104] The ancient law of the sea, preserved by the general articles, had thus

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[101] J. Stephens et al., supra note 47, at 14-15.

[102] 13 & 14 Car. 2, c. 3 (1661).

[103] 13 Car. 2, c. 89 (1661).

[104] Id., art XXXIII. J.E.R. Stephens et al. state that little is known about the circumstances of the enactment of the naval articles of 1661, but that a growing diversity among the regulations and articles issued by various naval commanders probably prompted the legislation. They point out that, unlike the army, the British navy was a permanent institution, and that a permanent code was necessary for Parliament to maintain control over the navy, which was not subject to annual authorization. J. Stephens et al., supra note 47, at 18-19.

survived the upheaval of the seventeenth century and the demise of royal prerogative.[105]

Two aspects of the seventeenth century development of military law are particularly important to this inquiry. First, although Parliament had the opportunity, both during the Commonwealth and in 1688, to make all military offenses purely statutory, it instead retained virtually unaltered the military common law that was, by that time, already some five centuries old. Since many of the members of Parliament were common law lawyers, this may not be particularly surprising. Secondly, it would appear that the reason why custom was retained as a source of military law was deference to the military commander's judgment, exercised through the officers he appointed to serve on the court-martial, as to what conduct was violative of military custom. John McArthur, writing in 1813, exclaimed, "This, as Sir William Blackstone observes, is a vast and important trust: an unlimited power to create crimes, and annex to them any punishments not extending to life or limb."[106] The general articles in the military codes were, according to McArthur, a conscious recognition of the special needs of military society:

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[105] The seagoing nature of the navy's mission seemed to allow customary punishments to linger as well. Penalties such as flogging, keelhauling, ducking, spread-eagling in the rigging, and wearing a wooden collar--all purely customary punishments--persisted well into the eighteenth century. 1 J. McArthur, supra note 70, at 327-332.

[106] Id. at 24, citing 1 Blackstone's Commentaries ch. xiii (1791).

> In these naval and military articles we see the defects of human wisdom discretely supplied and anticipated by general sweeping clauses, applying the punishment of those offenses which were not foreseen by the legislature at the time of legislation, and which could not, therefore, be specifically provided against; and in order that justice may not be retarded in its course, nor offences pass with impunity, the old standing customs and usage of the service are directed to be resorted to in like manner as the unwritten law is made auxiliary to the statute.[107]

## C. The American General Articles

### 1. The Articles of War

At the beginning of the American Revolution, the Continental Congress adopted contemporary British military law to govern the American forces. The decision to retain the British customs and discipline, with which most of the potential officers were familiar from their service in the French and Indian War, was more than just a matter of convenience. Instead, it was deliberate emulation and imitation. John Adams, who drafted the first American naval articles and the 1776 army code, expressed the reluctance of the Continental Congress to tamper with success:

> There was extant one system of articles of war which had carried two empires to the head of mankind: the Roman and the British; for the British articles of war were only a literal translation of the Roman. It would be in vain for us to seek in our own inventions, or the records of warlike nations, for a more complete system of military discipline. It was an observation founded in undoubted facts, that the

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[107] 1 J. McArthur, supra note 70, at 173. This language was also quoted in explanation of the American naval general articles in A. Harwood, The Law and Practice of United States Naval Courts-Martial 9 (New York 1867).

> prosperity had been in proportion to the discipline of their forces by sea and land.[108]

The first American army code was adopted by the Second Continental Congress on June 30, 1775. Drafted by a committee including George Washington, Philip Schuyler, Silas Deane, Thomas Cushing, and Joseph Hewes, the code contained 69 articles modeled after the British Articles of War of 1774. The first American army code contained two general articles. Article L, which was identical to its counterpart in the 1774 British articles,[109] provided:

> All crimes, not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the articles of war, are to be taken cognizance of by a general or regimental court-martial, and be punished at their discretion.[110]

Article XLVII was likewise substantially identical to its British counterpart[111] and provided: "Whatsoever commissioned officer shall be convicted before a general court-

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[108] 3 C. Adams, The Works of John Adams 68 (New York 1865), quoted in J. Van Slate, supra note 54, at 58.

[109] Rules and Articles for the Better Government of His Majesty's Horse and Foot Guards, And All Other His Majesty's Forces in Great Britain and Ireland, Dominions Beyond the Seas, and Foreign Parts, sec. XX, art. III (1774), reprinted in G. Davis, supra note 15, at 56 [hereinafter cited as British Articles of War of 1774].

[110] Act of June 30, 1775, art. L, reprinted in W. Winthrop, supra note 49, app. IX, at 957 [hereinafter cited as the American Articles of War of 1775].

[111] British Articles of War of 1774, supra note 109, sec. XV, art. XXIII, at 56, provided "Whatsoever Commissioned Officer shall be convicted before a General Court Martial of behaving in a scandalous infamous Manner, such as is unbecoming the Character of an Officer and a Gentleman shall be discharged from Our Service."

martial, of behaving in a scandalous, infamous manner, such as is unbecoming the character of an officer and a gentleman, shall be discharged from the service."[112]

The army general articles remained substantially unchanged through the enactment of additional articles in November 1775,[113] a complete revision of the army code in 1776,[114] and minor procedural revisions in 1786.[115] The Articles of War of 1806 revised the unbecoming conduct article to delete the "scandalous" and "infamous" language;[116] but left the prejudicial-conduct article unchanged.[117] The general articles of the 1806 code were

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[112] American Articles of War of 1775, supra note 110, art. XLVII, at 957.

[113] Act of Nov. 7, 1775, reprinted in W. Winthrop, supra note 49, app. IX, at 959-60.

[114] Act of Sep. 20, 1776, reprinted in id., app. X, at 961-71. The 1776 code was drafted by a committee including John Adams, Thomas Jefferson, John Rutledge, James Wilson, and R. R. Livingston, and was intended to make the American articles more closely follow the British. It also added several procedural and administrative provisions. Prejudical conduct was prohibited by sec. XVIII, art. 5; unbecoming conduct was covered by sec. XIV, art. 21.

[115] Act of May 31, 1786, reprinted in id., app. XI, at 972-975. The 1786 revisions included an unbecoming-conduct article, art. 20, that was substantially unchanged from the 1775 and 1776 codes.

[116] Act of Apr. 10, 1806, ch. 20, 2 Stat. 359. The unbecoming conduct article provided: "Any commissioned officer convicted before a general court-martial of conduct unbecoming an officer and a gentleman, shall be dismissed from the service." Id., art. 83, 2 Stat. 369.

[117] Id., art. 99, 2 Stat. 371.

reenacted substantially unchanged in the next major revision of the Articles of War in 1874 upon publication of the Revised Statutes.[118] A.W. 62 of the 1874 code provided:

> All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general, or a regimental garrison, or field-officers' court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.[119]

A.W. 61 of 1874 provided: "Any officer who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service."[120]

In 1916, the concept of service-discrediting conduct first appeared in the general articles, when A.W. 62 of the 1874 code was amended to read:

> Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and discipline, all conduct of a nature to bring discredit upon the military service, and all crimes and offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense and punished at the discretion of such court.[121]

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[118] Act of June 20, 1874, ch. 333, 18 Stat. 113, R.S. sec. 1342. Articles from the 1874 and subsequent Army codes will be denoted, e.g., A.W. 62 of 1874. Code citations for the 1874 Articles of War will be to the Revised Statutes.

[119] A.W. 62 of 1874, R.S. sec. 1342, art. 62.

[120] A.W. 61 of 1874, R.S. sec. 1342, art. 61. The placement of the unbecoming-conduct article in the 1874 code illustrates how the nature of the unbecoming-conduct articles changed during the nineteenth century from procedural provisions to punitive articles.

[121] Act of Aug. 29, 1916, ch. 418, art. 96, 39 Stat. 666.

This language would become the model for Article 134 of the Uniform Code.

2. The Articles for the Government of the Navy

American naval law likewise was consciously adopted from the law and custom of the Royal Navy. The "Rules for the Regulation of the Navy of the United Colonies of North America" of 1775,[122] largely the work of John Adams, consisted of 44 articles patterned after the British naval articles of 1749, which were still in effect. The ancient custom of the sea was the foundation of American naval law. In Article 1, for example, commanding officers were charged to

> be very vigilent in inspecting the behavior of all such as are under them, and to discountenance and suppress all dissolute, immoral and disorderly practices; and also, such as are contrary to the rules of discipline and obedience, and to correct those who are guilty of the same according to the usage of the sea.[123]

Article 38, which was similar to its British counterpart,[124]

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[122] Act of Nov. 28, 1775, reprinted in 2 Naval Documents of the American Revolution 1174-1182 (1966) [hereinafter cited as American Naval Articles of 1775] .

[123] Id., art. 1, at 1174.

[124] British Naval Articles of 1749, 22 Geo. 2, c. 33, art. XXXVI provided: "All other Crimes not Capital, committed by any Person or Persons in the Fleet, which are not mentioned in this Act, or for which no Punishment is hereby directed to be inflicted, shall be punished according to the Laws and Customs in such cases used at Sea."

provided: "All other faults, disorders and misdemeanors which shall be committed on board any ship belonging to the thirteen United Colonies, and which are not herein mentioned, shall be punished according to the laws and customs in such cases used at sea."[125]

After the Revolution, the U.S. Navy virtually ceased to exist, and sold its last ship in 1785. However, the threat from the Barbary corsairs in the early 1790s and the undeclared naval war with France in the latter part of that decade prompted the Navy's revival in 1794. In 1799, Congress enacted "An Act for the government of the Navy of the United States",[126] which contained a general article almost identical to that of the 1775 naval code.[127]

In 1800, the American naval code was revised under "An Act for the better government of the Navy of the United States".[128] The general article was amended to read: "All crimes committed by persons belonging to the navy, which are not specified in the foregoing articles, shall be punished according to the laws and customs of the sea."[129] The substitution of "crimes" for "faults, disorders and misdemeanors" seems to reflect a Congressional intent to

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[125] American Naval Articles of 1775, supra note 122, art. 38, at 1177.

[126] Act of Mar. 2, 1799, ch. 24, 1 Stat. 709.

[127] Id., art. 46, at 713.

[128] Act of April 23, 1800, ch. 33, 2 Stat. 45.

[129] Id., art. XXXII, at 49.

allow prosecution of civilian crimes under the naval general article, as well as the traditional offenses against naval discipline. What is more likely, however, is that the change was merely an effort to require that for a "fault, disorder" or "misdeameanor" to be punished under the naval general article, it must be conduct that, according to the law and custom of the sea, was recognized as an offense against naval law.[130] The legislative history is silent on the matter, and no nineteenth century commentator addressed it.

The 1800 naval articles also contained a new provision concerning scandalous conduct, an offense which was derived from the unbecoming conduct article in the British naval articles of 1749.[131] The American articles, however, made scandalous conduct a distinct offense applicable to both officers and sailors:

> An officer, or other person, in the navy, who shall be guilty of oppression, cruelty, fraud, profane swearing, or other scandalous conduct, tending to the destruction of good morals, shall, if an officer, be cashiered, or suffer such other punishment as a court-martial shall adjudge; if a private, shall be put in irons, or

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[130] The 1749 British naval articles similarly referred to such customary offenses as crimes. See note 124, supra.

[131] British Naval Articles of 1749, 22 Geo. 2, c. 33, art. XXXIII provided: "If any Flag Officer, Captain, or Commander, or Lieutenant belonging to the Fleet, shall be convicted before a Court Martial of behaving in a scandalous, infamous, cruel, oppressive, or fraudulent Manner, unbecoming the Character of an Officer, he shall be dismissed from His Majesty's Service."

> flogged, at the discretion of the captain, not exceeding twelve lashes; but if the offense require severer punishment, he shall be tried by court-martial, and suffer such punishment as said court shall inflict.[132]

The 1800 naval code remained in effect until 1862, when it was replaced by the Articles for the Government of the Navy,[133] the code that would govern the Navy for almost a century until the adoption of the Uniform Code. The language of the Articles for the Government of the Navy was substantially similar to that of the British naval articles of 1749 and to that of the 1800 American code, but it also reflected growing Congressional concern

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[132] Act of April 23, 1800, art. III, 2 Stat. 45. The U.S. Navy never had a separate article covering unbecoming conduct. Instead, unbecoming conduct was prosecuted under the naval general article. The "scandalous conduct" offenses under naval law will be relevant to later discussions of unbecoming conduct and service-discrediting conduct.

[133] Act of July 17, 1862, ch. 204, 12 Stat. 600, R.S. sec. 1624. Specific articles of the 1862 code will be denoted, e.g., A.G.N. 22. To avoid confusion arising out of the renumbering of the articles in the Revised Statutes, the numbering of the Revised Statutes, which was used from 1874, will be cited.

about procedural abuses in the administration of naval discipline.[134] A.G.N. 22, the general article, clearly reflects this: "All offences committed by persons belonging to the navy, which are not specified in the foregoing articles, shall be punished as a court-martial shall direct;

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[134]Emblematic of this attitude was the subtle change to the preambulatory article describing the powers and duties of the commanding officer. In the 1775 articles, the commanding officer was charged to enforce discipline "according to the usage of the sea". A similar invocation of the custom of the sea appeared in Art. 1 of the 1800 articles. A.G.N. 1, however, concluded with a charge to commanders to

> "guard against and suppress all dissolute and immoral practices, and to correct all who may be guilty of them according to the laws and regulations of the navy, upon pain of such punishment as a general court-martial may think proper to inflict." A.G.N. 1, R.S. sec. 1624, art. 1. (emphasis added).

Public interest in curtailing the near-absolute power of a naval captain at sea had been growing since the 1840s when both the public and the Navy was scandalized by the summary execution of Midshipman Philip Spencer--the son of the Secretary of War--and two enlisted men for attempted mutiny aboard the USS SOMERS in December 1842. When the alleged plot was discovered, the commanding officer, Commander Alexander Slidell Mackenzie, first promised the three suspects that they would be taken to New York for a court-martial. However, Mackenzie changed his mind while the ship was still at sea and convened a board of inquiry to determine what to do with the accuseds. The board, made up primarily of junior officers either related to Mackenzie or dependent upon him for patronage, without taking any testimony, recommended hanging, which was executed ten minutes later. Upon his return to New York, amid a firestorm of public controversy, Mackenzie was court-martialed but acquitted. The summary execution aboard the SOMERS was the last time the death penalty was executed in the U.S. Navy.

The change in language in the 1862 Articles, away from invocation of custom and toward references to laws, regulations, and court-martial procedures, does not then necessarily signal a change in naval law. Custom, as will be demonstrated later, continued to play a vital and expansive force in naval common law crimes.

but in no case shall punishment by flogging be inflicted, nor shall any court-martial adjudge punishment by flogging."[135]

### 3. The Enactment of the Uniform Code of Military Justice

By 1862 in the Navy and by 1916 in the Army, the American general articles has assumed the form and scope that would govern the armed forces until 1951. The Army's Articles of War were revised in 1916, 1920, and 1948, but without significant change to the general articles. In 1948, the Army Articles of War were made applicable to the new U.S. Air Force. The Coast Guard, which began its court-martial system in 1906, operated under a code patterned after naval law and practice.[136]

The legislative history of the Uniform Code with respect to the general articles is surprisingly sparse but their enactment was the result of a conscious decision to retain military common law offenses. Procedural matters, not substantive law, commanded the major attention of both the drafters of the Uniform Code and Congress. Nonetheless, the drafters considered several alternatives to the general

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[135] A.G.N. 22, R.S. sec. 1624, art. 22. In return for being free of flogging, the American sailor, under the same act, lost his daily spirits ration. Scandalous conduct was prohibited by A.G.N. 8, R.S. sec. 1624, art. 8, and, as in the 1800 naval articles, was applicable to both officers and enlisted members.

[136] E. Byrne, supra note 51, at 8-9.

articles, but rejected them in favor of incorporating military common law into the code.

Clearly, the principal concern in drafting the Uniform Code of Military Justice was the elimination of the widespread procedural abuses witnessed during World War II. In numerous studies of military justice conducted both during and after the war, therefore, committee after committee and report after report consistently pointed to an epidemic of abuse of command authority in the administration of military justice. The "Keefe Report", resulting from a Navy study of general court-martial sentences, concluded that almost half the cases studied involved a "flagrant miscarriage of justice". An Army study, conducted in 1945-46 by the "Vanderbilt Committee", found "fantastically severe" sentences to be commonplace.[137] Thus, the major goal of the Uniform Code was to prevent procedural abuses such as blatent command domination of the court-martial process, ineffective and inhibited defense counsel services, and discrimination against enlisted men in charging decisions and sentencing.[138] At the same time, the authority and responsibility of the commanding officer for discipline had to be preserved.

In matters of substantive law, the drafters of the

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[137] W. Generous, Swords and Scales: The Development of the Uniform Code of Military Justice 14-21 (1973).

[138] See White, The Uniform Code of Military Justice --- Its Promise and Performance: The Background and the Problem, 35 St. John's L. Rev. 197 (1961).

Uniform Code, a committee in the Office of the Secretary of Defense chaired by Professor Edmund Morgan, Jr., of Harvard Law School, did not consider themselves to be innovators. Rather, they viewed their task as preserving the substantive system commonly used by the military services, while updating and clarifying certain offenses.[139]

The only meaningful legislative history of Articles 133 and 134 are the working papers compiled by the Morgan Committee. The committee considered a number of alternatives to the general articles. One proposal, recommended by the McGuire Committee's 1945 study of possible revisions of the Articles for the Government of the Navy, would have abolished the general article and virtually eliminated any mention of specific offenses in the code. Instead the substantive portion of the code would merely incorporate by reference five general sources of substantive law: (1) federal criminal statutes and United States treaties and conventions; (2) criminal laws of a state, territory, or possession in which the military member is stationed; (3) lawful orders or regulations of the service secretary; (4) custom of the service; and (5) "recognized military offenses" as defined by the service secretary.[140] Another

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[139] Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services, 81st Cong., 1st Sess. 1238 (1949) (testimony of Felix Larkin) [hereinafter cited as House Hearings].

[140] Committee on a Uniform Code of Military Justice, Comparative Studies Notebook sec. 95, at 19 (Office of the Secretary of Defense, 1949).

proposal, also originating in the Navy Department, would have listed as many specific offenses as possible, but would have allowed the President to enumerate and define "military offenses" by Executive Order.[141]

While recognizing that such alternatives to the general articles had merit,[142] the Morgan Committee perceived serious constitutional objections to the delegation of legislative authority that they implied.[143] Moreover, the drafters believed that such a system of crimes defined by executive fiat could detract from the credibility of military justice "because much of the forcefulness and solemnity of the Articles, as a disciplinary and penal code, would be thereby lost."[144]

With only minor modifications in language, A.W. 96 of 1916 was adopted by the drafters as Article 134 of the proposed Uniform Code. A.W. 95 of 1916 became the unbecoming conduct provisions of Article 133, with modifications to include cadets and midshipmen, and to eliminate the mandatory-dismissal sentence provision of the Army unbecoming conduct articles. Both of these modifications were accommodations to Navy practice, which had included midshipment within the scope of its offense of unbecoming conduct, and which had not mandated dismissal upon

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[141] Id. at 22.

[142] Id. at 23.

[143] Id. at 19, 23.

[144] Id. at. 23.

conviction of unbecoming conduct.[145]

Like the drafters, Congress was more concerned about the procedural safeguards of the proposed Uniform Code. General questions such as the facial vagueness of the general articles, their substantive scope, and the myriad offenses that had been and could be prosecuted under them were never addressed in hearings nor during floor debate.[146] Thus, the general articles--which would prompt such intense and searching controversy only two decades later--and the ancient system of custom and military common law they represent quietly passed into modern military law.

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[145] See generally Senate Hearings, supra note 57, at 286 for comments of the Judge Advocate General of the Navy on the wording of Article 133.

[146] The scope of the general articles was discussed only with respect to certain specific offenses, such as carnal knowledge, House Hearings, supra note 139, at 1254, and whether violations of state criminal laws could be prosecuted under the general articles. See id. at 1238-1239 (testimony of Felix Larkin), and 96 Cong. Rec. 1292-1310 (1950)(Senate discussion of whether state law is included in "crimes and offenses not capital" clause). The Senate Armed Services Committee report on the general articles did not mention Article 133 at all, and merely parrotted the language of Article 134, which the Committee explained would

> "permit the punishment of 'disorders and neglects to the prejudice of good order and discipline in the armed forces, and all conduct of a nature to bring discredit upon the armed forces.' It will also authorize trial by court-martial for violation of State and Federal crimes which are not enumerated as offenses under this code." S. Rep. No. 486, 81st Cong., 1st Sess., 32 (1949)

The House report's discussion of the general articles was identical. H. Rep. No. 491, 81st Cong., 1st Sess., 35 (1949) It should be noted that the reports were mistaken about the inclusion of state laws within the scope of the "crimes and offenses not capital" clause. See Hagan, supra note 23, at 70-71.

## III. CUSTOM AND THE DEVELOPMENT OF GENERAL ARTICLES LAW

### A. Custom as a Source of Military Law

This thesis has already discussed how military law began and the enforcement of military custom, and how the purpose of the general articles was to incorporate customary military offenses into statutory systems of military law. It was during the nineteenth and early twentieth centuries that the substantive scope of the general articles expanded to approximately its modern dimensions and shape, and that the three classes of military common law offenses--prejudicial conduct, unbecoming conduct, and service discrediting conduct--emerged as clearly defined concepts in military law. It is also during this period that military law demonstrated the two attributes of a common law system of criminal law discussed previously: the reliance on custom as a source of substantive law, and the recognition of new common law offenses.

Custom was at the heart of nineteenth century general articles law, and was recognized as a lex non scripta that governed the many situations not addressed or contemplated by the military codes. In the 1827 Supreme

Court decision in Martin v. Mott,[147] Justice Story provided perhaps the earliest American judicial recognition of military common law: "a general usage of the military service, or what may not unfitly be called the customary military law."[148] Justice Story suggested that reliance on military custom was necessary to the peculiar nature and needs of military service, which statutes cannot always foresee; "for there could scarcely be framed a positive code to provide for the infinite variety of incidents applicable to them."[149]

In 1857 the Supreme Court, rejecting a void-for-vagueness challenge to the Navy's general article, characterized service usage and the laws and customs of the sea as substantive sources of naval law. Writing the Court's opinion in Dynes v. Hoover,[150] Justice Wayne described naval common law as follows:

> And when offences and crimes are not given in terms or by definition, the want of it may be supplied by a comprehensive enactment, such as the 32d article of the rules for the government of the navy, which means that courts martial have jurisdiction of such crimes as are not specified, but which have been recognized

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[147] 25 U.S. (12 Wheat.) 19 (1827). The Court held that even though there was no statutory authority for the court-martial by the U.S. Army of a state militia member who failed to report during a call-up in the War of 1812, court-martial jurisdiction could properly be based on customary military law concerning the duties of militiamen.

[148] Id. at 35.

[149] Id. at 36.

[150] 61 U.S. (20 How.) 65 (1857).

> to be crimes by the usages in the navy of all nations, and that they shall be punished according to the laws and customs of the sea. Notwithstanding the apparent indefiniteness of such a provision, it is not liable to abuse; for what those crimes are, and how they are to be punished, is well known by practical men in the navy and army, and by those who have studied the law of courts martial, and the offences of which the different courts martial have cognizance.[151]

The nineteenth century treatises also regarded custom of the service as a source of both procedural and substantive law. Stephen Vincent Benet, in his Civil War era treatise, called custom "the lex non scripta, a common law of the army",[152] being expressly recognized as a source of law by the oath for court-martial members prescribed by Article 69 of the 1806 Articles of War.[153] William W.

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[151] Id. at 82. The Court also noted that civil courts lacked jurisdiction to overturn court-martial sentences that are not contrary to statute or the laws and customs of the sea.

[152] S. Benet, A Treatise on Military Law and the Practice of Courts-Martial 9 (6th ed., New York, 1866).

[153] Id. The 1806 Army code prescribed the following oath: "You, A.B., do swear that you will well and truly try and determine, according to evidence, the matter now before you, between the United States of America and the prisoner to be tried, and that you will duly administer justice, according to the provisions of 'An act establishing Rules and Articles for the government of the armies of the United States,' without partiality, favor, or affection; and if any doubt should arise, not explained by said Articles, according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear that you will not divulge the sentence of the court until it shall be published by the proper authority; neither will you disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, in a due course of law. So help you God." Act of Apr. 10, 1806, ch. 20, art. 69, 2 Stat. 367-68.

Winthrop, probably the foremost nineteenth century authority on American military law--and still the most frequently cited--compared service custom to the common law:

> While the Military Law has derived from the Common Law certain of the principles and doctrines illustrated in its code, it has also a lex non scripta or unwritten common law of its own. This consists of certain established principles and usages peculiar or pertaining to the military status and service.[154]

George B. Davis, in his 1898 treatise, summarized the "unwritten military law" as being "a form of customary law developed from usages of the military service so constantly repeated and so long adhered to as to confer upon it the character of an authoritative rule of action."[155]

Both Winthrop and Davis described the role of custom in essentially common law terms. Custom of the service, said Davis, resembled in its origin and development "those portions of the Common Law of England which were of similar derivation."[156] Four conditions must be met for custom of the service to govern. First, in Winthrop's words, the custom "must have prevailed without variation for a long period".[157] Davis quoted Blackstone's rule on this point: "If a particular usage can be shown to have commenced, it is void as a custom...But if there is no evidence of a beginning, it will be presumed to have existed during the

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[154] W. Winthrop, supra note 49, at 42.

[155] G. Davis, supra note 15, at 10.

[156] Id. at 11.

[157] W. Winthrop, supra note 49, at 45.

whole period of legal record."[158] Secondly, the custom must be generally known and invariably observed by those alleged to be subject to its operation.[159] Third, the custom must establish a compulsory rule, in Davis's words "the obligatory form of a customary law".[160] Finally, the custom must not be at variance with existing military law. Davis felt that a custom of the service could be enforced so long as it was not contrary to a statute.[161] Winthrop was more restrictive, requiring that the custom must be "equitable, and uniform in its application, must not be prejudicial to military discipline, and must not only not be at variance with the statute or written law relating to the army but must pertain to a subject not provided for by such law."[162]

Thus, by the close of the nineteenth century, custom was a long-recognized source of both procedural and substantive law. The Davis-Winthrop exposition of custom as a source of law became official black-letter law in Naval Courts and Boards, the Navy's official procedural guide and

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[158] 3 Blackstone's Commentaries *74-77, quoted in G. Davis, supra note 15, at 11. As will be seen later, Winthrop's view on this point was probably more descriptive of military practice.

[159] Id.

[160] Id.

[161] Id.

[162] W. Winthrop, supra note 49, at 45.

substantive law treatise published in 1917. Naval courts-martial were directed to rely on custom of the service to resolve both substantive and procedural ambiguities:

> Circumstances from time to time arise for the government of which there are no written rules to be found. In such cases, customs of the service govern. Customs of the service may be likened, in their origin and development, to the portions of the common law of England similarly established. But custom is not to be confused with usage; the former has the force of law; the latter is merely a fact...
>
> The field of operation of the unwritten naval law is extensive. It is applied in defining certain offenses against naval law and in determining whether certain acts or omissions are punishable as such, as in cases coming under article 22 of the Articles for the Government of the Navy.... At times, also, custom is appealed to as a rule of interpretation of terms technical to the naval service.[163]

The members of the court-martial were the finders of this military common law. Whether particular conduct was, for example, prejudicial to good order and discipline was a factual issue for the members to decide, drawing on their experience and knowledge of military values, traditions, and customs. The question to be answered was "Does this accused's conduct violate customs of order and discipline?" Although commentators such as Winthrop and official publications such as the Army's Manuals for Courts-Martial and the Navy's Naval Courts and Boards provided general guidance on what constituted prejudicial conduct or unbecoming conduct, each court-martial was left largely to its own discretion in considering circumstances of each

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[163]Naval Courts and Boards, 1917, 9, 10.

case.[164] Their findings were rarely disapproved and only when clearly erroneous.

Toward the end of the nineteenth century, however, a counter-current in the use of custom began to appear in general articles law. Factual custom became legal precedent, and certain conduct began to be considered per se violative of the general articles. Instead of asking "Does this accused's conduct violate customs of order and discipline?" the question subtly shifted to "Has this conduct customarily been punished under the general articles?" without an analysis of the circumstances of the particular case. As will be seen later in this thesis, the per se approach to the general articles resulted in considerable confusion about the meaning of "custom" as the word was used in the opinions of the appellate military courts in the early 1950s.

The common law nature of the general articles made this shift from an analysis of the circumstances of each case to the invocation of precedent unavoidable. The best way to explain concepts such as "prejudicial to good order and discipline" and "conduct unbecoming an officer and a gentleman" was by examples, such as those extensively

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[164] See Hagen, supra note 23, at 109-10; W. DeHart, supra note 17, at 371. Cf. Nichols, supra note 77, at 124, who characterizes the decision of whether certain conduct fell under the general articles as a legal, not factual, question, i.e., "Is the conduct per se punishable under the general article?" not "Is it prejudicial to good order and discipline under the circumstances?".

provided by treatises such as Winthrop's and by the Digest of Opinions. Later, the Manuals for Courts-Martial and Naval Courts and Boards would likewise become commonly accepted as authoritative catalogs of offenses that were per se violative of the general articles. All a non-lawyer judge-advocate, commander, or court-martial member had to do to determine whether the accused could be convicted under the general article was to see if the conduct was listed as an example in a treatise, the Digest of Opinions, or a Manual. Custom of the service thus hardened into legal precedent by 1920.[165]

In the period from 1860 to 1917, however, custom was nonetheless at the heart of the growth of the substantive scope of the general articles. The three wars and numerous skirmishes against the Indians during these years would provide a multitude of challenges to military discipline and military law in the form of ingenious culprits and

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[165]This is certainly understandable. It must always be remembered that military justice in the nineteenth and early twentieth centuries--and, to a great extent, even until 1969--was administered by non-lawyer officers. Courts-martial were frequently held on the frontier, overseas, or on the high seas, far from lawyers and law libraries. Most commands had no legal references to consult other than a treatise--usually Winthrop's--or an official guide such as the Army's Manuals or Naval Courts and Boards. The treatises, particularly, were the only source of legal expertese for most commands. The importance of these references and the extent of reliance upon them, were impressed upon the author during his research at the U.S. Army Library at the Pentagon, where he found a copy of Winthrop's 1880 Digest of Opinions that had been painstakingly annotated by no fewer than five different persons from 1880 until approximately 1910.

novel circumstances. Turning now to the history and development of prejudicial conduct, unbecoming conduct, and service discrediting conduct, several interesting points will be demonstrated. First, each category, described by its own statutory language, has its origins in military common law. The statutes merely recognized classes of offenses that had long been prosecuted under the general articles. Secondly, each class of offenses was based on customary norms of discipline, duty, honor, and decorum in military society. Third, the emergence of each of these descriptive concepts did not signal a restrictive definition of the general articles, but rather provided a statutory focal point for the enforcement of custom. Finally, the principal historical effect of custom was not restrictive and limiting, as the Supreme Court supposed in Parker v. Levy, but instead was to provide elasticity to the substantive boundaries of the general articles.

## B. Prejudicial Conduct

### 1. Origins in Military Custom

It is uncertain exactly when the concept of prejudicial conduct was first enunciated in the military common law. One Australian scholar and military lawyer, D. B. Nichols, fixes its introduction in the first half of the eighteenth century, certainly no later than 1765, when it appeared in the British Articles of War of that year.[166]

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[166]Nichols, supra note 77, at 115.

James Snedeker, one of the drafters of the Uniform Code of Military Justice, places its origin a full century earlier.[167]

The concept of conduct to the prejudice of good order and discipline almost certainly predates its appearance in the military codes. Some evidence suggests Roman origins. The laws of Arrius Meander, for example, provided: "Every disorder to the prejudice of general discipline is a military offense, such as, for instance, the offense of laziness, or insolence, or idleness."[168] Furthermore, the very purpose of military law was from its beginning the preservation of discipline. In a sense, all military offenses were prejudicial to good order and discipline. Finally, as has been discussed previously in this thesis, the principal purpose of the early British military penal codes was to put the troops on notice of the rudimentary features of the body of military law to which they would be subject. Therefore, when the concept of conduct prejudicial to good order and discipline began to appear in military codes in the seventeenth century, it was merely a convenient reference to the customary offenses, not otherwise enumerated in the codes, that had long been a part of military law.

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[167] J. Snedeker, supra note 16, at 898-99.

[168] Roman Digest XLIX, sec. 16, at *6, quoted in Graynor, supra note 48, at 26.

Interestingly, the prejudicial conduct concept was introduced to the British military codes by the Swedes. The "Articles and Military Lawes to be Observed in the Warres" promulgated by King Gustavus Adolphus in 1621[169] provided in Article 116 that:

> Whatsoever is not contained in these Articles, and is repugnant to Military Discipline, or whereby the miserable and innocent country may against all right and reason be burdened withall, whatsoever offence finally shall be committed against these orders, that shall the severall Commanders make good, or see severally punished unlesse themselves will stand bound to give further satisfaction for it.[170]

The articles of Gustavus Adolphus were published in English in 1639 and became the model for British articles issued that same year and in 1642.[171] A major reason for the emulation of the Swedish code by the English was that

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[169] The code of Gustavus Adolphus has been called a "recognizable ancestor" of the Uniform Code of Military Justice. Containing 167 articles, it was perhaps the most detailed military law code to its time, both in matters of substantive law and court-martial procedure. In many respects, Gustavus Adolphus could be called, as one recent article has suggested, the "father of modern military justice". See Cooper, Gustavus Adolphus and Military Justice, 92 Mil. L. Rev. 129 (1981).

[170] Articles and Military Lawes to be Observed in the Warres, art. 116 (1621), reprinted in W. Winthrop, supra note 49, app. III, at 914. James Snedeker likewise considers this provision to be a lineal ancestor of Article 134 of the Uniform Code. J. Snedeker, supra note 16, at 898.

[171] Cooper, supra note 169, at 134. J. Snedeker, supra note 16, at 898, see also C. Clode, Administration of Justice Under Military and Martial Law 12 (2d ed. 1874).

a large number of British officers had served with Gustavus Adolphus during the Thirty Years War.[172] The "repugnant to Military Discipline" language of Article 116 of the Swedish articles was not used in the British general articles in 1639 or 1642,[173] nor would anything similar to it appear in the British army codes until 1765.[174] Although the reason for this omission is apparently lost to history, it is reasonable to assume that with the centuries-old heritage of military common law that already existed in seventeenth century England, the drafters of the 1639 and 1642 codes viewed "repugnant to Military Discipline" as surplussage denoting a concept implicit in "faults, disorders, and offenses" language already common to British general articles.[175]

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[172] Cooper, supra note 169, at 133. For example, in 1632, 32 colonels, 52 lieutenant colonels, and 14 majors, mostly Scots, served under Gustavus Adolphus.

[173] The 1639 general article is quoted, supra, in Part II-B-2. The articles issued in 1642 by the Earl of Essex, commander-in-chief of the Parliamentary forces, provided: "All other faults, disorders and offences, not mentioned in these articles shall be punished according to the general customes and laws of warre." Nichols, supra note 77 at 113.

[174] Sec. XX, art. III, of the British Articles of War of 1765 is quoted, supra, in Part II-B-3, and prohibited "Crimes not Capital" and "Disorders or Neglects...to the Prejudice of good Order and Military Discipline".

[175] Although the British articles were modeled after those of Gustavus Adolphus, language more traditional to British military codes was used. The Articles of War of 1625, for example, referred to customary military offenses as "disorders", while the 1627 general article for the army used the phrase "abuses and offences". Nichols, supra note 77, at 113.

A clearer indication of the origins of the prejudicial conduct concept in military common law is to be found in naval law. British naval articles prior to the American Revolution and American naval codes thereafter never specifically mentioned prejudicial conduct, but instead employed a variety of traditional denominations of the customary naval offenses: "faults, misdemeanors, and disorders";[176] "All other Crimes not Capital";[177] "faults, disorders and misdemeanors";[178] and "offenses".[179]

There are two theories explaining this apparent omission. The first explanation views the omission of prejudicial conduct language from the naval articles as an intentional recognition of the peculiar needs of the naval service. D. B. Nichols hypothesizes that:

> [I]t seems possible to draw the conclusion that the concept was introduced to reconcile the exigencies of overseas service with the tenets of the common lawyers. Although the scope for the trial of crimes by court

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[176] British Naval Articles of 1661, 13 Car. 2, c. 89, art. XXXIII, quoted, supra, in Part II-B-2.

[177] British Naval Articles of 1749, 22 Geo. 2, c. 33, art. XXXVI, quoted supra note 124.

[178] American Naval Articles of 1775, supra note 122, art. 38, at 1177, quoted, supra, in Part II-C-2.

[179] A.G.N. 22, R.S. sec. 1624, art. 22, quoted, supra, in Part II-C-2. By 1866 the Royal Navy had adopted prejudicial conduct language in its general article. "Every person subject to this Act who shall be guilty of any act, disorder, or neglect to the prejudice of good order and naval discipline, not herein-before specified, shall be dismissed from Her Majesty's service, with disgrace, or suffer such other punishment as is herein-after mentioned." Naval Discipline Act, 1866, 29 & 30 Victoria, c. 109, art. 43.

> martials in England in time of peace was narrow and contrary to the successful beliefs of the 17th century, wider provision was necessary for overseas service. Military law could be justified on the ground of necessity. The legitimacy of the general article would be strengthened by limiting it to those offenses which imparied the efficiency of the army. There had never been the same objection to a standing navy and the obvious requirements of discipline on board ship justified an unqualified general article.[180]

The second and more likely explanation is that the practice of punishing behavior prejudicial to good order and discipline was already indelibly engrained in customary naval law, having been implicit in the commanding officer's authority and responsibility under the law of the sea to enforce and preserve discipline. The American naval articles particularly stressed the commander's ancient powers and charged commanding officers to "suppress all dissolute, immoral, and disorderly practices, and also such as are contrary to the rules of discipline and obedience...".[181] Moreover, even without express statutory mention of prejudicial conduct, the Navy prosecuted conduct prejudicial to good order and discipline, denominated as such, under its single general article.[182] Thus, the addition of "to the

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[180] Nichols, supra note 77, at 115.

[181] American Naval Articles of 1775, supra note 122, art. 1, at 1174.

[182] "Conduct to the prejudice of good order and discipline" was one of 32 general classes of general articles offenses listed in Naval Courts and Boards. "Conduct unbecoming an officer and a gentleman" was another example. Naval Courts and Boards, 1917, sec. 390, at 217-18.

prejudice of good order and military discipline" to the Navy's general article would have neither added to nor restricted naval law; and its absence posed no impediments nor gave rise to any substantive distinctions from the military common law of the Army.

2. The Scope of Prejudicial Conduct

The scope of prejudicial conduct expanded to its modern dimensions between 1860 and 1907. Although the Army general articles, A.W. 99 of 1806 and A.W. 62 of 1874, differed somewhat from the Navy's A.G.N. 22 of 1862, the two services generally prosecuted the same offenses as prejudicial conduct. Of course, there were a very few notable exceptions. The Navy, for example, considered concealing venereal disease as conduct prejudicial to good order and discipline,[183] while the Army, at least in the case of enlisted men, specifically held to the contrary.[184] On the other hand, the Army long recognized negligent homicide as prejudicial conduct, while the Navy apparently

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[183] Naval Court and Boards, 1937, sec. 457, at 237.

[184] Opinion of the Judge Advocate General of the Army No. 72-210 (1913), Digest of Opinions of the Judge Advocate General of the Army 1912-1932, sec. 1488 (1932) [hereinafter cited as Army Dig. Op.] .

never did.[185] On the whole, however, prejudicial conduct under the general articles was a single body of substantive criminal law administered by two separate jurisdictions. Both the Army and the Navy court-martial systems shared a common core value of the primacy of discipline, and each drew on its own values, customs, and traditions to apply the concept of prejudice to discipline to the cases it tried under the general articles.

It is impossible to say with any reasonable historical certainty how many distinct types of misconduct were recognized as prejudicial to good order and discipline. The field seems to stretch beyond the visible horizon. It includes offenses which a modern military lawyer would readily recognize as prejudicial to good order and disci-

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[185] See United States v. Kirchner, 1 C.M.A. 477, 4 C.M.R. 69, 70 (1952); see generally Zoghby, Is There a Military Common Law of Crimes? 27 Mil. L. Rev. 75, 90-91 (1965). Although the Navy did not, prior to the Uniform Code, prosecute negligent homicide denominated as such, careless handling and discharge of weapons resulting in death was recognized as prejudicial conduct under A.G.N. 22. United States v. Reed, C.M.O. 33 at 8-12 (Navy 1914).

pline, such as drunkenness,[186] impersonating an officer,[187] and disloyal statements.[188] Others are now merely historical curiosities, such as "inefficiency in service against Indians",[189] illegally introducing liquor into the Indian country,[190] and "arbitrary treatment of camp followers".[191] In some cases the courts-martial found prejudice to good order and discipline in somewhat humorous circumstances. Consider, for example, the 1897 case of a Marine private who, while paraded at formation to hear his sentence in a previous court-martial announced, behaved in "a frivolous

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[186] See W. Winthrop, supra note 49, at 722-23, for a discussion of how drunkenness "has always been a more heinous offence in the military than in the civil code."

[187] Id. at 731. Winthrop footnoted each example with numerous case citations. Nineteenth-century Army citation convention, however, identified cases only by the number of the order approving the findings and sentence, the headquarters issuing the order, and the year. Since Army court-martial orders were not published in any system of reporters, they are no longer readily retrievable by modern researcher. Their citation in this thesis would be of no practical vale. Moreover, Colonel Winthrop's treatise is still accorded such authority by modern courts that reference to it is, as a practical matter, sufficient to support a proposition. Navy cases during this period, however, will be cited in the format shown, supra, at note 185, because there is no secondary source of American naval law comparable to Winthrop. Naval court-martial orders from this period are filed chronologically at the Office of the Judge Advocate General of the Navy, Alexandria, Virginia.

[188] Id. at 728.

[189] Id. at 727.

[190] Id. at 731.

[191] Id. at 727.

and improper manner" by playing with a stray dog that wandered onto the parade deck.[192]

Colonel Winthrop's Military Law and Precedents is still considered to have the most complete list of the various types of misconduct that had been found by Army courts-martial to constitute conduct prejudicial to good order and discipline. Winthrop catalogued 123 distinct "neglects and disorders" as well as a number of civilian noncapital crimes that could also be prosecuted under the general article if they were, under the circumstances, prejudicial to good order and discipline.[193] Even with Colonel Winthrop's extensive, painstakingly cited list, one cannot help but feel that he attempted to measure an iceberg; for Winthrop intended his examples of prejudicial conduct to be only illustrative, not definitive.[194] The vast substantive territory encompassed by prejudicial conduct offenses was suggested by Winthrop's comments on the phrase "disorders and neglects":

> In this comprehensive term are included all such insubordination; disrespectful or insulting language or behaviour towards superiors or inferiors in rank; violence; immorality; dishonesty; fraud or falsification; drunken, turbulent, wanton, mutinous, or irregular conduct; violation of standing orders, regulations, or instructions; neglect or evasion of official or routine duty, or failure to fully or properly perform it; --- in fine all such "sins of commission

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[192] United States v. Daley, G.C.M.O. 109 (Navy 1897).

[193] See W. Winthrop, supra note 49, at 726-33.

[194] Id. at 726.

> or omission," on the part either of officers or soldiers as, on the one hand, do not fall within the category of the "crimes" previously designated, and, on the other hand, are not expressly made punishable in any of the other ("foregoing") specific Articles of the code, while yet being clearly prejudicial to good order and military discipline.[195]

Nothwithstanding the great variety of prejudicial conduct offenses that emerged between 1860 and 1970, they can be classified into several broad categories, all of which were clearly identifiable by 1900. While in certain cases the categories may appear to overlap, each class describes a value traditionally viewed as vital to the preservation of discipline.

1. Derelictions of duty. Prior to the enactment of Article 92 of the Uniform Code, the unsatisfactory performance or nonperformance of a duty imposed by superior authority or by custom of the service was punishable as prejudicial conduct. Many examples involved somewhat mundane shortcomings, such as allowing prisoners to escape,[196] and inattention to lessons at the post school.[197] Dereliction of duty also involved the culpably unsatisfactory performance of important military responsibilities, for which officers seemed particularly subject to prosecution. Examples of such serious derelictions included

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[195] Id. at 722 (emphasis in original).

[196] Id. at 729.

[197] Id. at 731.

devolving important work upon an incompetent subordinate,[198] failure to maintain discipline,[199] failure to quell a riot,[200] failure to supervise and inspect public work under one's charge,[201] causing troops to be transported on a steamer known to be unsafe,[202] medical malpractice,[203] and failure by the senior officer present to assume command when it devolved to him.[204] By contrast, mere errors in judgment having no material consequences were generally

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[198] Id. at 726.

[199] Id. See also Confederate States v. Cannet, G.O. 94 (Dept. of S. Car. & Ga., C.S.A., 1862)(failure to halt fleeing sentinels and make them stand their posts), reported in Military Laws of the Confederate States 134-35 (Richmond, 1863). The Confederacy adopted the U.S. Army's Articles of War of 1806 with the exception of substituting "Confederate States" for "United States" and substituting other provisions concerning precedence among officers and devolution of command. "An Act for the establishment and organization of the Army of the Confederate States of America", March 6, 1861, sec. 29, reprinted in Military Laws of the Confederate States 7, 12-13.

[200] W. Winthrop, supra note 49, at 726.

[201] Id.

[202] Id. at 728, Army Dig. Op., 1901, sec. 159, at 54.

[203] Id.; W. Winthrop, supra note 49, at 728; United States v. Willson, G.C.M.O. 6 (Navy 1883)(willful refusal to treat patients during a yellow fever epidemic).

[204] Army Dig. Op., 1901, sec. 159, at 54.

not held prejudicial to good order and discipline.[205]

2. Offenses against military administration. Examples of this group of prejudicial conduct offenses would include the following: graft or impropriety in procurement of military supplies;[206] falsification of

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[205] United States v. Driscoll, C.M.O. 7-1917 (Navy 1917). But see the British court-martial of Lt. Gen. John Whitelock, who was convicted and cashiered in 1808 for prejudicial conduct arising out of his blunders during the siege of Buenos Aires in July 1807. In short, General Whitelock's offense was to snatch defeat from the jaws of victory, a victory won despite his leadership. The four specifications of which he was convicted alleged: (1) making "offensive and unusual" surrender demands that only encouraged the Spanish garrison at Buenos Aires to continue their resistance, thus increasing "the difficulties of the service"; (2) failing to "make the military arrangements, best calculated to ensure the success of his operations", thus unnecessarily exposing British troops to danger; (3) failing to support several divisions under his command which, without support or instructions, were compelled to surrender; and (4) having captured Buenos Aires, only to return it to the Spanish as part of surrender terms he imposed on the defeated Spanish! The misadventures of General Whitelock and his resulting court-martial are reported in C. James, A Collection of the Charges, Opinions and Sentences of General Courts Martial 262-64 (London 1820).

[206] W. Winthrop, supra note 49, at 729, cites examples such as: accepting false receipts for government funds not paid; conflicts of interests in military procurement; and accepting bribes; United States v. Little, C.M.O. 41-1915 (Navy 1915)(unauthorized and illegal agreement with ship-building company resulting in government having no recourse in the event of defective workmanship; acquittal disapproved by Secretary of the Navy as not in accordance with the evidence). Cf. Smith v. Whitney, 116 U.S. 167 (1886) (Navy's Chief of the Bureau of Provisions and Clothing convicted of scandalous conduct, rather than merely prejudicial conduct, for making illegal contracts and payments for, and conflicts of interest in, procurement of naval supplies).

reports, documents, or official statements;[207] failure to observe the chain of command;[208] obstruction or abuse of military justice;[209] and misconduct during a court-

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[207] Falsifications by enlisted men were customarily prosecuted as prejudicial conduct; those by officers were prosecuted as unbecoming conduct. W. Winthrop, supra note 49, at 732. The Navy followed a similar practice. See United States v. Gallagher, G.C.M.O. 24 (Navy 1895) (procuring ferry passage with forged pass as prejudicial conduct); United States v. Higgens, G.C.M.O. 23 (Navy 1894) (falsifying parental consent to enlist). Cf. United States v. Seely, G.O. 148 (Navy 1869) (deliberate misrepresentation to commanding officer as unbecoming conduct). Some falsifications by officers were also prosecuted in the Navy as scandalous conduct, especially when made to cover up other wrongdoing. See e.g. United States v. Kershner, G.C.M.O. 30 (Navy 1896) (false testimony by officer to court of inquiry); United States v. Houston, G.C.M.O. 56 (Navy 1888) (false statement concerning cheating on an examination).

[208] United States v. Ormsby, G.C.M.O. 37 (Navy 1886).

[209] W. Winthrop, supra note 49, at 726, 728, 730, citing examples such as: failure to bring offending inferiors to punishment; failure to report misconduct by soldiers under noncommissioned officer's supervision; and ordering a garrison court to try a capital case and then arresting the court-martial members when they properly ruled that they lacked subject matter jurisdiction over such an offense. See also United States v. Webster, G.C.M.O. 3 (Navy 1882) (failure to forward incriminating statements by witnesses to altercation between two other officers).

martial.[210]

3. Insubordination and disloyalty. Examples of offenses in this category all involve violations of customs of deference to military authority, including disrespectful or insubordinate statements[211] or conduct;[212] willful

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[210] W. Winthrop, supra note 49, at 728, 730, citing examples such as: improperly disclosing proceedings in secret session; refusal by member to vote for a sentence after a conviction; drunken or disrespectful behavior at trial; false testimony; "transcending the privilege of the defence or 'statement' by indulging in unwarrantable strictures upon a superior officer, or gross personalities"; suborning or attempting to suborn perjury; attempting to intimidate witnesses; failure to appear before a court-martial, either as a witness or the accused; and appearing drunk before a court-martial. Such misconduct was also punished, in the case of officers, as unbecoming conduct, id. at 714, or, in especially aggravated cases in the Navy, as scandalous conduct. United States v. Mahoney, G.C.M.O. 104 (Navy 1896)(officer incapacited by drunkenness to serve as judge-advocate at a Marine Corps general court-martial; "a far graver offense" than mere drunkenness).

[211] In the Army, A.W. 20 of 1874, R.S. sec. 1342, art. 20, prohibited only disrespect towards one's commanding officer; disrespectful statements or conduct toward other superiors was prosecuted as prejudicial conduct. W. Winthrop, supra note 49, at 728. See also, e.g., United States v. Thompson, G.C.M.O. 81 (Navy 1894)(stating "Well, I'll go anyway" to executive officer when leave request denied); United States v. Durand, G.C.M.O. 5 (Navy 1882)(disrespectfully persisting in demand to see superior officer on quarterdeck rather than privately in the superior's cabin as the latter had requested); United States v. Wheeler, G.O. 182 (Navy 1873)(officer declaring in presence of other officers that he would not perform duties involving manual labor or physical exertion because they were "unbecoming an officer of his rank").

[212] W. Winthrop, supra note 49, at 728, 731, citing examples such as: participating in meetings convened for purpose of expressing disapproval of the orders or acts of superiors; joining with others in requesting the resignation of a superior officer; "combining and holding meetings in a spirit of insubordination against superior authority"; and inciting insubordination by circulating incendiary circulars.

disobedience of orders not cognizable under a specific article of the codes;[213] and making or publishing critical,[214] defamatory,[215] or disloyal[216] statements. Also

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[213] In the Army, A.W. 21 of 1874, R.S. sec. 1342, art. 20, prohibited disobedience only of the orders of a superior officer. Willful disobedience of others authorized to issue lawful orders to the accused, such as a noncommissioned officer, petty officer, or person in the execution of law enforcement duties, was punished under the general articles. See also, e.g., United States v. Wiles, G.C.M.O. 35 (Navy 1897)(willful disobedience of Naval cadet); United States v. Pettit, G.C.M.O. 65 (Navy 1896)(willful disobedience of chief petty officer); United States v. Flynn, G.C.M.O. 11 (Navy 1895)(willful disobedience of noncommissioned officer); United States v. Fleming, G.C.M.O. 22 (Navy 1894) (sailor in custody of Marine patrol disobeying order to stop singing); United States v. Bostick, G.C.M.O. 95 (Navy 1893)(officer refusing to give countersign to sentry).

[214] W. Winthrop, supra note 49, at 727, 731; United States v. O'Neill, G.C.M.O. 37 (Navy 1896)(complaining of commanding officer's "unfairness" to newspaper reporter).

[215] W. Winthrop, supra note 49, at 732 (preferring false charges); United States v. Decker, C.M.O. 5-1917 (Navy 1917)(defamation of superior officer concerning disputed debt superior allegedly owed accused). Defamation by officers would often also be prosecuted as unbecoming conduct. W. Winthrop, supra note 49, at 714.

[216] Id. at 728; Navy C.M.O. 37-1917 at 4 (1917) (multiple case court-martial order; accused's name not recited). See also Army Dig. Op., 1912-1930, sec. 1462, at 725, citing cases holding disloyal statements under military law to be a distinct offense from those prohibited by Espionage Act of 1917, 40 Stat. 217.

arguably included as a disrespectful prejudicial conduct offense would be an assault on a superior in the execution of his office,[217] although they could also fit into other categories.[218]

4. Status offenses. This category includes violations of one's military status such as aggravated forms of unauthoriezed absence,[219]

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[217] In the army, A.W. 21 of 1874 prohibited assault against one's superior officer in the execution of his office. Assaults against noncommissioned officers were prosecuted under the general article. W. Winthrop, supra note 49, at 732. The Navy, which prohibited assaults against superior officers, in the execution of office, under A.G.N. 4, R.S. sec. 1624, art. 4(3), followed a similar practice. See, e.g., United States v. Hooper, G.C.M.O. 4 (Navy 1881)(assault on sergeant of the guard by Marine prisoner); United States v. Douglas, G.C.M.O. 49 (Navy 1880)(assaulting members of ship's police); United States v. Bracken, G.O. 145 (Navy 1869)(assault with an earthen bowl upon a noncommissioned officer).

[218] This category would also include actions by officers that devalue their superiority in rank over subordinates, such as fraternization. Such conduct was usually prosecuted as unbecoming conduct, but occasionally would be charged merely as prejudicial conduct when the circumstances were not particularly aggravated or dishonorable. See, e.g., United States v. Berrien, G.C.M.O. 16-1917 (Navy 1917)(inviting enlisted man on duty to saloon for a drink; "It is contrary to the spirit of the day and of the service for any officer to set the example of drinking and treating with men who look to officers for leadership and guidance."); United States v. Liggett, C.M.O. 19-1914 (Navy 1914)(officer drinking with enlisted men in officers' messroom).

[219] E.g., United States v. Moss, C.M.O. 40-1915 (Navy 1915)(AWOL after leave expired thereby willfully missing ship's movement); United States v. Hopkins, G.C.M.O. 50 (Navy 1882)(commander of naval hospital AWOL during yellow fever epidemic).

escapes,[220] fraudulent enlistment,[221] and attempted desertion.[222]

5. Liquor-related offenses. The propensity of soldiers and sailors to drink, and the serious harm to discipline that can result, gave rise to a constellation of liquor-related offenses, such as: drunkenness on post or aboard ship,[223] or on liberty;[224] bringing or smuggling liquor on post[225] or aboard ship;[226] allowing a subordinate to go on duty when known to be intoxicated;[227] incapacitation

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[220] W. Winthrop, supra note 49, at 729; United States v. Clark, G.C.M.O. 93 (Navy 1896)(violation of arrest by removing leg irons); United States v. Bryant, G.C.M.O. 73 (Navy 1895)(attempted escape); United States v. Carr, G.C.M.O. 68 (Navy 1895)(escape and attempted AWOL).

[221] W. Winthrop, supra note 49, at 733-35; United States v. Jacobson, G.C.M.O. 102 (Navy 1893).

[222] W. Winthrop, supra note 49, at 729.

[223] Winthrop stated, "There can indeed rarely be an occasion when a soldier, or an officer, in camp or at a military post, may become intoxicated, and thus incapacitated for properly answering a call for duty, without rendering himself liable to be treated as an offender within the terms of Art. 62." Id. at 723.

[224] Id. at 723: "Whether the act, when committed under other circumstances, as where the party is at a station which is not a military post, or is travelling, or is on a pass, &c., may properly be charged as a military offence, will depend upon the relation and effect, if any, which such act may have, under the circumstances, to the military service and upon military discipline."

[225] Id. at 729; e.g., United States v. Parsons, G.C.M.O. 86 (Navy 1894)(smuggling liquor into Navy yard).

[226] Naval Courts and Boards, 1917, sec. 390, at 217; e.g., United States v. Long, G.C.M.O. 53 (Navy 1888).

[227] W. Winthrop, supra note 49, at 727.

for duty due to prior intoxication;[228] and violating formal pledge to abstain from liquor.[229]

6. Disorderly conduct. Prejudicial conduct also included a class of misconduct that could be broadly described as disorderly conduct. The core value of these offenses was the preservation of the ordered routine upon which military discipline depends. Also present, particularly in cases arising off-post or ashore, is a suggestion of a need to prevent service-discrediting behavior, which undermines public respect for the military and thereby complicates the performance of the military mission in an area. Examples of disorders in this class would include

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[228] United States v. Lange, C.M.O. 2-1917 (Navy 1917) (incapacitation requiring hospitalization). The Navy seemed to prosecute incapacitation for duty more often as scandalous conduct, particularly in the cases of officers and petty officers. See, e.g., United States v. Schonborg, C.M.O. 16-1914 (Navy 1914)(chief boatswain's mate); United States v. Adams, G.C.M.O. 50 (Navy 1898)(officer "suffering from the effects of a debauch"); United States v. Smith, G.C.M.O. 39 (Navy 1895)(disbursing officer).

[229] W. Winthrop, supra note 49, at 732. Officers violating such pledges were more frequently prosecuted for unbecoming conduct. Id. at 718; e.g., United States v. Frary, G.C.M.O. 31 (Navy 1882). The Navy would also occasionally prosecute violations of temperance pledges as scandalous conduct. E.g., United States v. Hobson, G.C.M.O. 9 (Navy 1879)(pledge violated by drunkeness aboard ship).

such diverse offenses as: wifebeating, especially when in the presence of other soldiers;[230] officers gambling with enlisted men;[231] insulting, provoking, or obscene language;[232] disrupting a Salvation Army meeting;[233] carelessly setting fire to a forest in a national part;[234] possession of contraband[235] or stolen goods;[236] and fighting with another officer in the presence of enlisted men.[237]

7. Civilian noncapital crimes. In the nineteenth century noncapital felonies and misdemeanors under civilian criminal law were prosecuted as prejudicial conduct. In theory, such crimes were punishable only when, under the circumstances, they prejudiced good order and discipline.

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[230] W. Winthrop, supra note 49, at 731.

[231] Id. at 727, 730. Gambling on the post was also prosecuted as prejudicial conduct.

[232] United States v. Scott, G.C.M.O. 107 (Navy 1897) (obscene and threatening language to hospital patients); United States v. Mull, G.C.M.O. 130 (Navy 1896)(to a sentry); United States v. Heriot, G.C.M.O. 41 (1895)(to a chaplain).

[233] W. Winthrop, supra note 49, at 731.

[234] Id. at 732.

[235] Navy C.M.O. 53-1917 at 4 (1917)(civilian clothing); Navy C.M.O. 15-1918 at 4 (1918)(narcotics).

[236] Navy C.M.O. 72-1917 at 6 (1917)(pawning stolen goods).

[237] United States v. Meade, G.C.M.O. 29 (Navy 1882). Such conduct was also commonly prosecuted as unbecoming conduct. W. Winthrop, supra note 49, at 714.

Such a limitation appears to have been only unevenly observed, particularly on the frontier and overseas. By 1907 whatever requirement of prejudice ever existed in cases involving civilian crimes was abandoned, and civilian noncapital crimes emerged as an independent basis for criminal liability under the general articles. This development will be discussed in greater detail later.

### 3. Custom and Deference in the Expansion of Prejudicial Conduct

Three characteristics of nineteenth century prejudicial conduct law are particularly noteworthy; because they not only explain the expansion of the substantive scope of prejudicial conduct, but also provide insight into the nature, purpose, and function of the general articles today.

First of all, prejudicial conduct law was firmly rooted--perhaps more than any other substantive area of military law--in the need to preserve and enforce discipline. Not surprisingly, a bias in favor of discipline seemed to shape the determination of whether the accused's conduct was prejudicial to good order and discipline.

Military discipline has traditionally been viewed as a fragile entity, nonetheless absolutely essential for the successful completion of the military mission. Especially on the frontier, overseas, and at sea, every court-martial was something of a cause celebre. In a close case,

acquittal of a charge of prejudicial conduct could, it was commonly felt, impair discipline by creating the appearance that the accused had beaten the system. Therefore, in many cases, the benefit of the doubt on the issue of prejudice went to the command, not to the accused.

By the end of the nineteenth centry, the major American commentators agreed that any prejudice to order or discipline must be direct, not remote or merely a possibility. Winthrop's statement of the rule, which has survived to be included in the present edition of the Manual,[238] is certainly the most familiar to military lawyers:

> An irregular or improper act on the part of an officer or soldier can scarcely be conceived which may not be regarded as in some indirect or remote sense or manner prejudicing military discipline; but it is hardly to be supposed that the Article contemplated such distant effects, and the same is therefore deemed properly to be confined to cases in which the prejudice is reasonably direct and palpable.[239]

However, as Winthrop also noted, "a strict rule on this subject, however, has not been observed in practice."[240] Especially with respect to off-base civilian crimes, courts-martial tended to conclude that the accused's conduct was prejudicial even when his conduct prejudiced discipline in, at best, an arguably hypothetical way. Although the records

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[238] See M.C.M., 1969 (Rev.), para. 213b, at 28-72.

[239] W. Winthrop, supra note 49, at 723 (emphasis in original).

[240] Id. at 725.

of most of these old courts-martial are, at best, incomplete, and, at worst, have been lost, the surviving records often raise legitimate doubts about whether there really was a reasonable and palpable risk to discipline in a given case.

Consider, as just one of scores of potential examples, the nineteenth century convictions, cited in Winthrop, for abusing one's wife in the presence of other soldiers.[241] How could such behavior have posed a direct and palpable threat to good order and discipline within the unit, especially if the accused was an enlisted man? Would the witnesses have been likely to emulate such conduct? Consider also the 1893 conviction of a soldier who disrupted an off-base Salvation Army meeting and assaulted those who ejected him from the hall.[242] While such conduct certainly prejudiced the good order of the Salvation Army, prejudice to military discipline seems remote. Likewise the offense of selling liquor to the Indians,[243] which could easily have hurt good order and discipline among the various Indian customers, seems to have, at best, an attenuated impact on military discipline.[244]

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[241] Id. at 731, citing 1881 and 1887 cases.

[242] Id., citing an 1893 case.

[243] Id., citing an 1889 case.

[244] If anything, such examples suggest service discrediting conduct, and, as will be discussed, infra, in Part III-C, are evidence that such conduct was punished under the general articles long before it appeared in the Articles of War of 1916.

The explanation of such apparent aberrations is that prejudicial conduct was jury-made law. The members of the court-martial, acting in a capacity analogous to a civilian jury, would decide whether an accused's conduct was prejudicial largely through an ad hoc application of general notions of discipline to specific cases.[245] As previously noted,[246] the treatises were the principal source of guidance on the question of what constitutes prejudicial conduct; but they usually dealt only in broad generalities.[247] Specific examples, such as those recited by Winthrop or listed in the Digest of Opinions, were helpful and relied upon in similar cases; but, they were of little use in novel cases and, for the most part, applicable only, at best, by analogy to the Navy, which had its own distinct customs, values, and disciplinary needs. Thus, in a novel case, the court-martial members had to rely on their own knowledge of military customs to assess the extent of prejudice to good order and discipline. When a novel prejudicial conduct offense was found by a court-martial, it was the product of a reliance on military custom as the members perceived it, rather than case precedents listed in

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[245] Graynor, supra note 48, at 265.

[246] Supra, note 165.

[247] See Justice Stewart's criticism of Winthrop's explanation of "conduct unbecoming an officer and a gentleman" in Parker v. Levy, 417 U.S. at 777 (Stewart, J., dissenting).

Winthrop[248] or the generalized musings of the commentators. Discipline was thus enforced by those presumably most familiar with it by their own experience and most directly involved with and dependent upon it, the officers selected to sit on the court-martial.

This leads to the second important characteristic of the development of prejudicial conduct law: the central role of the court-martial members. Not only did the members, by convicting an accused of prejudicial conduct, implicitly find as a factual matter that the conduct, under the circumstances, was prejudicial to good order and discipline;[249] but their findings were given great deference by both military reviewing authorities and civilian courts.

It is not surprising, therefore, that convictions for prejudicial conduct were very rarely disapproved on grounds of accused's conduct not having been directly and palpably prejudicial to good order and discipline.[250]

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[248] Indeed, every such case cited by Winthrop was, at one time, a novel offense. Moreover, Winthrop seems to have made a special effort to cite some of the more ususual factual patterns in order to demonstrate the broad scope and variety of prejudicial conduct.

[249] See Hagan, supra note 23, at 100. But see Nichols, supra note 77, at 124, who characterizes the court-martial's determination as one of law. The great deference accorded a finding of guilty, however, suggests that it was treated as a finding of fact.

[250] In the Navy, from 1863 through 1897, not a single conviction for prejudicial conduct under A.G.N. 22 was disapproved on the grounds that the conduct was not sufficiently prejudicial.

There were, of course, procedural reasons for this reluctance to overturn the court-martial's finding. Although a reviewing authority could lawfully disapprove a finding of guilty with unfettered discretion and without stated reason,[251] deference to the court-martial's findings was preferred. Thus, Winthrop advised that "it will in general be wise" for the reviewing authority to approve convictions unless clearly unsupported by any evidence.[252]

Beneath this procedural reluctance to overturn supportable findings of fact, however, was a more basic philosophical deference to the court-martial members as experts in matters of military custom and discipline. Prejudicial conduct cases inherently involved an assessment of probable impact on discipline. Reviewing authorities in the service deferred to the court-martial members as the ones most intimately involved with disciplinary considerations at the local command, where the conduct occurred and where its adverse impact would usually occur. Civilian courts were likewise loathe to scrutinize the findings of a properly convened court-martial not only out of consideration for the separation of powers,[253] but also because of

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[251] W. Winthrop, supra note 49, at 691.

[252] Id. at 691-92.

[253] Courts-martial are commonly known as "Article I courts", arising out of the power of Congress "To make Rules for the Government and Regulation of land and naval Forces". U.S. Const., art. I, sec. 8, cl. 14. Also, military justice has traditionally been viewed as the exercise of the President's powers as Commander in Chief under Id., art. II, sec. 2, cl. 2.

unfamiliarity with the ways of the separate society. Thus, in Smith v. Whitney, Justice Gray demurred: "Of questions not depending upon the construction of the statutes, but upon unwritten military law or usage, within the jurisdiction of courts-martial, military or naval officers, for their training and experience in the service, are more competent judges than courts of common law.[254]

By 1900 the philosophy of deference had hardened into a procedural rule promulgated by the Judge Advocate General of the Army. Concerning whether civilian crimes against civilian victims can be conduct prejudicial to good order and discipline, "the judgment on the subject of a court of military officers, experts as to such cases, confirmed by the proper reviewing commander, should be reluctantly disturbed."[255]

In civilian courts, deference crystallized into a rule of virtual non-reviewability of military administrative and disciplinary decisions. In Swaim v. United States[256] the former Judge Advocate General of the Army brought an action in the Court of Claims to recover back pay and restoration to duty following his conviction in 1885 under the general article. In rejecting Swaim's claim, the Court of Claims stated:

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[254]Smith v. Whitney, 116 U.S. at 178.

[255]Army Dig. Ops., 1901, sec. 1, at 53.

[256]28 Ct.Cl. 173 (1893), aff'd 165 U.S. 553 (1897).

> The cases which involve conduct to the prejudice of good order and military discipline are still further beyond the bounds of ordinary judicial judgment, for they are not measurable by our innate sense of right and wrong, of honor and dishonor, but must be gauged by an actual knowledge of experience of military law, its usages and duties. All that a civil court can do in these collateral cases is to look into the record and see that the wide discretion which the articles of war give to a court-martial and the commanding officer who approves the sentence has not been abused; that the sentence does not rest on suppositions or frivolous pretexts; that the case presents facts which a body of experienced, intelligent, impartial, military experts may reasonably hold, in the exercise of a sound discretion, to be prejudicial to good order and military discipline. When such facts appear, the civil court must concede that they constitute the offense embodied in the charge.[257]

On appeal to the Supreme Court, Justice Shiras flatly rejected Swaim's contention that his conduct had not been prejudicial to good order and discipline as being non-reviewable: "...this is the very matter that falls within the province of courts-martial, and in respect to which their conclusions cannot be controlled or reviewed by the civil courts."[258]

The third notable characteristic of prejudicial conduct law during its formative years was the expansive pressure within the court-martial system to extend the

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[257] Id., 28 Ct.Cl. at 227.

[258] Id., 165 U.S. at 562. See also Reaves v. Ainsworth, 219 U.S. 296, 304 (1911): "To those in the military or naval service of the United States, the military law is due process. The decision, therefore, of a military tribunal acting within the scope of its lawful powers cannot be reviewed or set aside by the courts." The non-reviewability doctrine was not overturned until Harmon v. Brucker, 355 U.S. 579 (1958).

scope of general articles prosecutions beyond that which could reasonably be argued to be prejudicial to good order and discipline. The source of this expansive pressure was the perceived need not only to thwart obvious threats to internal order and discipline, but also to bring under court-martial jurisdiction other misconduct that had only a remote possible impact on discipline but nonetheless threatened other military values such as service reputation in the civilian community. The situs of this expansion was at the trial level.

This internal pressure for expansion of the scope of the general articles is best demonstrated in the emergence of noncapital civilian crimes as a separate and distinct theory of general articles liability in Army law. By the late nineteenth century a rule had emerged to the effect that civilian crimes could be prosecuted under the Army's general article only if they actually prejudiced good order and discipline in a direct and palpable way. Otherwise, a soldier's crimes against civilian law could be punished by a court-martial only if committed in time of war, insurrection, or rebellion.[259] In 1896 Colonel Winthrop noted that the rule was observed more in its breach than in compliance, but he was reluctant to second-guess the discretion of the commander in close cases:

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[259]A.W. 58 of 1874, R.S. sec. 1342, art. 58.

> A strict rule on this subject, however, has not been observed in practice; and, especially as the civil courts do not readily take cognizance of crimes when committed by soldiers, military commanders generally lean to the sustaining of the jurisdiction of courts-martial in cases of crimes so committed against civilians, particularly when committed on the frontier, wherever the offence can be viewed as affecting, in any material though inferior degree, the discipline of the command--a question which may in general, in the judgment of the author, properly be left to be decided by the Department, &c., commander, in each instance.[260]

By 1901, however, Colonel Winthrop, authoring the Digest of Opinions, backed away even further from requiring actual prejudice in cases involving civilian crimes: "Whether acts committed against civilians are offenses within this Article is a question to be determined by the circumstances of each case, and in regard to which no general rule can be laid down."[261] In language strikingly prescient of the factors that the Supreme Court would list 70 years later in Relford v. Commandant[262] as being determinative of whether there was court-martial jurisdiction over an off-base offense, Winthrop suggested several criteria, any one of which would be sufficient to characterize a civil crime as sufficiently prejudicial to good order and discipline to sustain prosecution under the general article: (1) the offense was committed on or near a military

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[260] W. Winthrop, supra note 49, at 725 (emphasis in original). Winthrop noted that the fact that the offense was committed publicly in uniform was generally regarded as prejudicial to good order and discipline. Id., n. 89.

[261] Army Dig. Op., 1901, sec. 158, at 62.

[262] 401 U.S. 355 (1971).

reservation; (2) it was committed while the accused was on duty; (3) it was committed in the presence of other soldiers; (4) it was committed while the accused was in uniform; or (5) the accused used his military status or position, or that of another, in committing the offense.[263]

On the few occasions during this period on which it considered the general articles, the Supreme Court demonstrated a similar drift away from a strict application of the "direct and palpable" rule. In Ex parte Mason,[264] for example, the "Jack Ruby" of the 1880s, an army sergeant, attempted to kill President Garfield's assassin, who was under his guard at the federal jail in Washington, D.C. In his petition for a writ of habeas corpus, Mason contended that his offense was not directly prejudicial to military discipline and was therefore not punishable under A.W. 62. The Supreme Court, per Chief Justice White, disagreed, characterizing his conduct as "an attrocious breach of military discipline".[265] Even though Mason's victim was a civilian, Mason was performing a military duty because he had been assigned guard duty. The crime was more than the civilian offense of assault with intent to kill; instead, the court characterized it as "assault by a soldier on duty

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[263]Army Dig. Op., supra note 261. Cf. Relford v. Commandant, 401 U.S. 355, 365 (1971).

[264]105 U.S. 696 (1882).

[265]Id. at 698.

with intent to kill a prisoner confined in a jail over which he was standing guard."[266]

To this extent, Ex parte Mason seems consistent with the rule as espoused by Winthrop and other commentators of of the period. The case could also be viewed as merely deference to the court-martial's finding that military discipline has been prejudiced. However, toward the end of Chief Justice White's opinion, the exact nature of Mason's offense seems to become confused in language suggestive of the future development of civil crimes as a distinct theory of general articles liability:

> But when the act charged as "conduct to the prejudice of good order and military discipline" is actually a crime against society which is punishable by imprisonment in the penitentiary, it seems to us clear that a court-martial is authorized to inflict that kind of punishment. The act done is a civil crime, and the trial is for that act. The proceedings are had in a court-martial because the offender is personally amenable to that jurisdiction, and what he did was not only criminal according to the laws of the land, but prejudicial to the good order and discipline of the army to which he belonged...[267]

In 1901, the Supreme Court again treated direct prejudice to good order and discipline as a necessary element for conviction of a civilian crime under the general Article.[268] Six years later, in Grafton v. United States,[269]

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[266] Id.

[267] Id. at 6.

[268] Carter v. McClaughry, 183 U.S. 365, 397 (1901).

[269] 206 U.S. 333 (1907).

the Court finally recognized what had been slowly developing in military law for some thirty years: the emergence of a new, distinct type of general articles offense not requiring proof of prejudice to good order and discipline. Grafton had been acquitted by a general court-martial of homicide charged under A.W. 62 of 1874. He was thereafter tried and convicted in civilian court of the same homicide under Philippine law, notwithstanding his plea of autrefois acquit. The Supreme Court reversed the civilian conviction, holding that it violated Grafton's Fifth Amendment protection against double jeopardy, inasmuch as he had already been tried for the same offense by the Army.

The government argued at the Supreme Court that, under the rationale of Ex parte Mason, the court-martial had tried Crafton for a distinct and separate military offense: homicide to the prejudice of good order and discipline. The Court punctured this legal fiction, and gave A.W. 62 a much broader reading than had Winthrop and other nineteenth century commentators:

> The crimes referred to in that article manifastly embrace those not capital, committed by officers or soldiers of the Army in violation or public law as enforced by civil power. No crimes committed by officers or soldiers of the Army are excepted by the above article from the jurisdiction thus conferred upon the court-martial, except those that are capital in nature. While, however, the jurisdiction of general courts-martial extends to all crimes, not capital, committed against public law...within the limits of the territory in which he is serving, this jurisdiction is not exclusive, but only concurrent, with that of the civil courts.[270]

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[270] Id. at 348.

Grafton is now considered the formal establishment of what are now commonly called "clause (3) offenses" under Article 134 of the Uniform Code: "crimes and offenses not capital".[271] In 1916, when the Army's Articles of War were revised, A.W. 96 replaced the prejudicial conduct article of the 1874 code and clearly described noncapital civil crimes as a distinct theory of general articles liability, independent of concepts of prejudice to good order and discipline and of service discredit. A.W. 96 of the 1916 code provided:

> Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and discipline, all conduct of a nature to bring discredit upon the military service, and all crimes and offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense and punished at the discretion of such court.[272]

In summary, then, the law of prejudicial conduct was founded on ancient values and customs in the military community concerning what enhances discipline and what jeopardizes it. Although a considerable body of case precedent developed between the Civil War and World War I, especially

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[271] See J. Snedeker, supra note 16, at 483; Hagen, supra note 23, at 72-75.

[272] A.W. 96, Act of August 29, 1916, ch. 418, 39 Stat. 666. At the same time, Congress enacted A.W. 93, 39 Stat. 664-665, which conferred court-martial jurisdiction over the following offenses previously triable only during was, insurrection, or rebellion; manslaughter, mayhem, arson, burglary, robbery, larceny, embezzlement, perjury, assault with intent to commit any felony, and assault with intent to do bodily harm.

in the Army, the ultimate issue of whether given conduct was prejudicial to good order and discipline was determined by reference to the customs of the service with respect to the discipline-preserving values at the heart of the seven general categories of prejudicial conduct offenses outlined above.[273]

By and large, the system worked well, because those closest to the problems of preserving discipline, the court-martial members, played the central role. These "practical men"[274] were also, in a sense, legal oracles, applying military custom to specific, and often unusual, circumstances. These ad hoc panels of officers meeting on the frontier, overseas, or aboard a ship at sea were accorded great deference. In a functional sense, they were the law givers concerning not only prejudicial conduct but, as will be seen later, also with respect to military common law generally; and neither military superiors nor civilian courts were prone to disagree with their findings.

The development of prejudicial conduct law also demonstrates the limits of custom and military common law. Once the Army's courts-martial wandered beyond those offenses directly impacting on military discipline, customs of the service became little more than desperate legal

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[273] Supra at Part III-B-2.

[274] See Dynes v. Hoover, 61 U.S. at 82, for quotation in context.

fictions. Unable to force all misconduct that commanders and court-martial members thought should be prosecuted under the general articles into the conceptual limits of direct and palable prejudice to good order and discipline, military courts began to grasp at often fanciful risks of prejudice in cases involving civil noncapital crimes. The pressure was finally relieved by the divorce of civilian crimes from the prejudicial conduct concept, and by the emergence of a separate concept of service discrediting conduct.

### C. Unbecoming Conduct

#### 1. Customary Standards of Officer Conduct

Article 133 of the Uniform Code prohibits conduct unbecoming an officer and a gentleman. No provision of the Code presents more difficult questions of definition and limitation. While "conduct to the prejudice of good order and discipline" is equally amorphous on its face, it at least compels the application of reasonably definite customs and values concerning the preservation of discipline to the actual facts and circumstances of the accused's conduct. "Conduct unbecoming an officer and a gentleman", by contrast, seems to turn the court-martial into a judicial seance, conjuring up the ideal officer, who is by nature and military position also the model nineteenth century gentleman or lady, a person possessing the most highly

prized personal attributes of that age: personal honor, trustworthiness, sobriety, decorum, and devotion to duty. The twentieth century accused is then compared to this spectre.

Unbecoming conduct is more than bad manners, and has been considered for centuries to be one of the more serious violations of military law. In the Army codes, dismissal under dishonorable conditions was mandated for any officer convicted of unbecoming conduct. The U.S. Navy had no specific article mandating dismissal, but the usual consequence of conviction of unbecoming conduct under the Navy's general article was the same. The severity of the customary penalty for unbecoming conduct implies the seriousness of the misconduct contemplated: that which not only comprises one's personal character, but also compromises his or her standing as an officer, with the responsibilities and authority that an officer's status legally and customarily implies.

What standard is expected of officers? The current Manual, in language with a pronounced nineteenth century tone, sketches the ideal officer, but with only broad pencil strokes:

> There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty or unfair dealing, of indecency or indecorum, or of lawlessness, injustice, or cruelty. Not everyone is or can be expected to meet ideal moral standards, but there is a limit of tolerance below which the individual standards of an

> officer, cadet, or midshipman cannot fall without seriously compromising his standing as an officer, cadet, or midshipman or his character as a gentleman.[275]

The Manual links personal honor to professional standing. Unbecoming conduct can therefore be committed by official or private misconduct. Misconduct in one's official capacity is unbecoming if, "in dishonoring or disgracing the individual as an officer" it also "seriously compromises his character as a gentleman". Private misconduct "in dishonoring or disgracing the individual personally" must also seriously compromise his or her standing as an officer.[276]

The concept of unbecoming conduct was the second distinct class of offenses to emerge from the military common law. It was rooted in two attributes of separateness: (1) the separateness of military society and its fundamental value of discipline; and (2) the distinct and higher standard of personal conduct expected of officers, whose leadership, if it is to be effective, must be sustained not just by the legal forces of their orders, but by personal example. Unbecoming conduct thus prejudiced discipline by weakening the moral authority of officers over their subordinates.

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[275] M.C.M., 1969 (Rev.), para. 212, at 28-70.

[276] Id.

## 2. The Emergence of the Unbecoming Conduct Concept

Unbecoming conduct did not appear in the military codes until the eighteenth century. Among the earliest provisions in the British articles was the following provision from the British naval articles of 1749: "If any Flag Officer, Captain, or Commander, or Lieutenant belonging to the Fleet, shall be convicted before a Court Martial of behaving in a scandalous, infamous, cruel, oppressive, or fraudulent Manner, unbecoming the Character of an Officer, he shall be dismissed from his Majesty's Service."[277] The British army's articles of 1765 likewise stated: "Whatsoever Commissioned Officer shall be convicted before a General Court-Martial of behaving in a scandalous infamous Manner, such as is unbecoming the Character of an Officer and a Gentleman, shall be discharged from Our service."[278]

The appearance of unbecoming conduct in the codes did not, however, signal the creation of a new military offense. As John McArthur suggested in his 1813 treatise, unbecoming conduct had long been a part of the military common law of

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[277] 22 Geo. 2, c. 33, art. XXXIII (1749).

[278] Articles of War of 1765, supra note 100, sec. XV, art. XXIII, reprinted in W. Winthrop, supra note 49, app. VII, at 945. As noted previously, identical language was used in the British Articles of War of 1774 and, with only one minor change, in the American Articles of War of 1775, art. 47.

both the British army and the Royal Navy.[279] Moreover, its relatively late appearance in the codes, and the position of the unbecoming conduct articles in the organization of the eighteenth and early nineteenth century codes, suggest that the intent was not to create a new military offense, but merely to prescribe a mandatory punishment for an officer convicted of unbecoming conduct as defined by military custom.

The British codes particularly were not a rambling catalog of offenses, but were in both services clearly organized, structured systems of military justice. In the British naval articles of 1749, the unbecoming conduct article was the first of four articles concerning how certain classes of offenses were to be punished, and were distinct from Articles II through XXXII, which listed specific offenses. In the British Articles of War of 1765, the organization was even clearer. Unbecoming conduct appeared in Section XV, "Administration of Justice", the articles which set forth court-martial procedures and punishments to be imposed in special circumstances. The punitive articles were contained in Sections I through XIII. The early American army articles adopted a similar organization. If fact, it was not until 1874 that unbecoming conduct was moved from the procedural sections of

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[279] 1 J. McArthur, supra note 70, at 49, 106. McArthur considered unbecoming conduct to be of customary rather than statutory origin.

the Articles of War to the end of the punitive articles, signalling the emergence since 1806 of unbecoming conduct as a distinct constellation of substantive offenses.

In the early nineteenth century British courts-martial had already broadly construed "unbecoming the Character of an Officer and a Gentleman". The customary standards of conduct expected of a British officer were applied to a variety of misconduct. Records of Royal Navy courts-martial include dismissals for unbecoming conduct such as the following: selling one's sword, sash, and clothes, and "keeping low company";[280] allowing oneself to be ejected from a coffee house;[281] treating another officer with "frequent abuse and unofficer-like behavior";[282] and drunkenness, sleeping on watch, and repeated insolence to a superior officer.[283] Examples of unbecoming conduct in the British army during the same period include: accepting money in return for discharges, pardoning deserters for money, and false entries in the orderly book;[284] returning to duty

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[280] Rex v. Steel (HMS GRAFTON 1759( reported in 2 J. McArthur, supra note 70, app. XXXIII, at 423.

[281] Rex v. Loake (HMS REPULSE 1763) reported in id. at 426.

[282] Rex v. Titchborne (HMS BUCKINGHAM 1771) reported in id. at 429.

[283] Rex v. Drummond (HMS SEAHORSE 1774) reported in id.

[284] Rex v. Cawthorne (Westminster Reg. of Middlesex 1795) reported in C. James, supra note 208, at 1-21.

after having promised to resign one's commission, and an altercation with another officer in the mess;[285] personally insulting another officer in the mess with "most indecent expressions", "outrageously breaking windows", and "conducting himself in a very riotous manner" while on duty;[286] assaulting an innkeeper, then publicly defying one's commanding officer to prove the misconduct;[287] outrageously disturbing a private party where present as a guest by using abusive language to another member of his regiment and waylaying him afterward;[288] "keeping company with persons highly disgraceful for an officer to associate with, viz., a journeyman baker and a tinman's apprentice";[289] ordering soldiers of the town guard to break open an ale house;[290] public boxing;[291] price-gouging on the sale of

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[285] Rex v. Robertson (North British Militia 1801), reported in id. at 78-80.

[286] Rex v. Beerling (1st Surrey Reg. of Militia 1801), reported in id. at 85-86.

[287] Rex v. Wilkens and Spunner (55th Reg. of Foot 1802), reported in id. at 106-109.

[288] Rex v. Carmichael (25th Reg. of Foot 1803), reported in id. at 134-36.

[289] Rex v. Myers (1st Reg. of Foot 1806) and Rex v. Duckett (37th Reg. of Foot 1806), reported in id. at 204-207.

[290] Rex v. Duckett (37th Reg. of Foot 1806), reported in id. at 219-220. With two general courts-martial in less than a year, Lt. John Taylor Duckett was apparently a one-man crime wave in the 37th Regiment.

[291] Rex v. Stevenson (6th West India Reg. 1807), reported in id. at 272.

uniforms and keeping false accounts.[292]

On the other hand, not all disorderly conduct by officers was found sufficiently unbecoming to warrant dismissal. Thus, the King disapproved a conviction for throwing a glass of wine in the face of a regimental surgeon because, although "extremely disorderly", it was not sufficiently scandalous or infamous.[293] Likewise, under the peculiar circumstances of the case, beating a debilitated man and bragging about it to several soldiers nearby was held by a court-martial not to be unbecoming conduct because of the victim's provocation of the incident.[294] Witnessing and promoting drunkenness and "excesses" among a group of privates, while found to be an offense prejudicial to good order and discipline, was helf not sufficiently scandalous or infamous to constitute unbecoming conduct.[295]

Thus scandal and infamy seemed to be at the heart of the British concept of unbecoming conduct. American practice, however, soon dropped the requirement that the officer's conduct be "scandalous and infamous". Although the early American articles required, as did their British

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[292]Rex v. Hewetson (2d Batn. of 9th Reg. 1808), reported in id. at 275-78.

[293]Rex v. Lawson (Cumberland Reg. of Militia 1803), reported in id. at 138-39.

[294]Rex v. Blake and O'Mealy (16th Lt. Dragoons 1802), reported in id. at 280-81.

[295]Rex v. Jolliffe(N. Hants Reg. of Militia 1813), reported in id. at 515-18.

models, that the officer's conduct must be "scandalous and infamous" to be unbecoming under military law,[296] the 1806 revisions of the Articles of War delected "scandalous and infamous" from the unbecoming conduct article.[297] Steven Vincent Benet, quoting extensively from an 1852 review by the Secretary of War in an unbecoming conduct case, stated that by dropping "scandalous and infamous", Congress intended that it no longer be necessary to allege or prove that an officer's conduct was scandalous or infamous.[298] George Davis, writing three decades later, maintained that the purpose of the 1806 amendment was merely to alleviate confusion with the common law meaning of "infamous".[299] One modern scholar, relying on Benet and Winthrop, has surmised that the purpose of the deletion was to promote a higher standard of conduct among officers by lowering the threshold of criminal liability for unbecoming conduct.[300]

The Navy's articles were never so amended. As noted previously, the U.S. Navy never had an article specifically

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[296] E.g., Articles of War of 1775, art. 47 quoted in Part II-B-1, supra.

[297] A.W. 83 of 1806, 2 Stat. 359, quoted supra note 116.

[298] S. Benet, supra note 152, at 176.

[299] G. Davis, supra note 15, at 468.

[300] Ackroyd, The General Articles, Articles 133 and 134 of the Uniform Code of Military Justice, 35 St. John's L. Rev. 264, 272 (1961), citing W. Winthrop, supra note 49, at 710-11, and S. Benet, supra note 152, at 274-77.

prohibiting unbecoming conduct, which was instead punished under the Navy's single general article. "Scandalous conduct" was a separate offense in the American naval articles, applicable to both officers and enlisted men.[301] Scandalous conduct therefore continued to be prosecuted in the naval half of American military law until the enactment of the Uniform Code.[302]

In the Army, even after the 1806 amendments to the Articles of War, "scandalous and infamous" remained a viable concept in the law of unbecoming conduct, although it was no longer a sine qua non for conviction. According to DeHart, writing in 1846, the concept "must necessarily be understood as implied in order to give the unbecoming conduct article

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[301] Act of April 23, 1800, art. 3, 1 Stat. 45-46, quoted in Part II-B-2, supra. A.G.N. 8, R.S. sec. 1624, art. 8 (1), provided: "Such punishment as a court-martial shall adjudge may be inflicted on any person in the navy... guilty of profane swearing, falsehood, drukeness, gambling, fraud, theft, or any other scandalous conduct tending to the destruction of good morals."

[302] See, e.g., United States v. Case, C.M.O. 6-1914 (Navy 1914) (officer exposing self while drunk and lying on couch in country club cloakroom); United States v. Carpenter, G.C.M.O. 121 (Navy 1897) (homosexual acts by enlisted man with another sailor); United States v. Dodd, G.C.M.O. 23 (Navy 1895)(surreptitious removal of belongings by officer from rooming house to evade paying rent); United States v. Fillette, G.C.M.O. 55 (Navy 1894)(officer enticing high school student to elope); United States v. Brown, G.C.M.O. 60 (Navy 1888)(petty officer returning from AWOL drunk and threatening to shoot self with loaded revolver); United States v. Brown, G.C.M.O. 3 (Navy 1887)(officer attending meeting of a secret society where enlisted men asked "highly indecent and immoral" questions as part of initiation).

a proper application."[303] Winthrop, writing 90 years after the 1806 amendment, believed that even though the scandalous nature of the accused's conduct no longer needed to be proven, the concept remained at the core of unbecoming conduct laws:

> It is only required that it should be "unbecoming"--a comprehensive term including not only all that is conveyed by the words "scandalous" and "infamous" but more. At the same time the original phraseology is properly borne in mind as indicating that, to become the subject of a charge, the unbecoming conduct should be not slight but of a material and pronounced character.[304]

Along with a lingering connotation of scandal, even after 1806, concepts of honor and disgrace also were an important part of the law of unbecoming conduct, and also a source of some uncertainty. All the major commentators of the nineteenth century agreed that, by law and military custom, an officer was presumed to be a gentleman,[305] subject to a higher standard of private and official conduct than were civilians or enlisted personnel. As one judge commented in 1891, "In military life there is a higher code termed honor, which holds its society to stricter accountability; and it is not desirable that the standards of the Army shall come down to the requirements of a criminal

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[303] W. DeHart, supra note 17, at 370.

[304] W. Winthrop, supra note 49, at 711.

[305] Id. at 711; W. DeHart, supra note 17, at 371-75; G. Davis, supra note 15, at 468-69; F. Dudley, Military Law and the Procedure of Courts-Martial 409 (2d ed. 1908).

code."[306] But need disgrace or dishonor be present in every case of unbecoming conduct? Davis maintained that disgrace and dishonor were inherent in unbecoming conduct,[307] as did DeHart.[308] Winthrop, writing at the same time as Davis, wasn't sure. While he defined unbecoming conduct as being of a nature to "offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender",[309] he also pointed out that it was not essential that the act be intrinsically dishonorable. Colonel Winthrop quoted General Hancock's reviewing action in an 1867 court-martial:

> It is not considered that the conduct of an officer should necessarily affect his honor to make him subject to a charge laid under this Article. An officer may be guilty, in the heat of passion, of conduct properly as laid, without affecting his honor... Although dishonorable conduct is conduct unbecoming an officer and a gentleman, the converse of the proposition is not always true.310

Professor Edgar Dudley, writing in 1908, went a bit farther than Winthrop, and flatly rejected scandal and dishonor as necessary concepts in the law of unbecoming

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[306] Fletcher v. United States, 26 Ct. Cl. 541, 563 (1891), aff'd in part and rev'd in part, 148 U.S. 84 (1893).

[307] G. Davis, supra note 15, at 469-70.

[308] W. DeHart, supra note 17, at 371.

[309] W. Winthrop, supra note 49, at 711.

[310] Id. at 712, n. 19, quoting G.O. 25, Dept. of the Mo. (1867).

conduct.[311]

When then is the standard of the officer? Because of the inherent difficulty that notions of dishonor, disgrace, and scandal posed, military courts in the nineteenth century synthesized a more workable concept to identify unbecoming conduct: the extent to which the offender's status as an officer has been compromised. General McClellan, in his action reviewing a Civil War case, stated, "military men do not consider the charge sustained unless the evidence shows the accused to be one with whom his brother officers cannot associate without loss of self respect."[312] Davis characterized the officer guilty of unbecoming conduct as "an unfit associate for officers and gentlemen" whose "expulsion from the society of such is necessary to the preservation of the respect due them as a class."[313] Writing in the Digest of Opinions of 1880, Colonel Winthrop viewed this functional definition of unbecoming conduct as the logical consequence of the punishment mandated by the Articles of War: "The Article, in making the punishment of dismissal imperative in all cases, evidently contemplates that the while unfitting the party of the society of men of a scrupulous sense of decency and honor, shall exhibit him as

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[311] E. Dudley, supra note 306, at 409.

[312] G.O. 111, Army of the Potomac (1862), quoted in W. Winthrop, supra note 49, at 712, n. 25.

[313] G. Davis, supra note 15, at 469.

unworthy to hold a commission in the army."[314] In his 1896 treatise, Colonel Winthrop concluded that the most reliable test of unbecoming conduct is "[t]he fitness... of the accused to hold a commission in the army, as discovered by the nature of the behaviour complained of, or rather his worthiness, morally, to remain in it after and in view of such behaviour..."[315]

Thus, the question for the court-martial members was whether the officer's conduct was so bad as to necessitate his expulsion from the society of officers.[316] The members, all officers themselves prior to the enactment of the Uniform Code, were therefore required to draw on their knowledge of military custom concerning acceptable conduct for officers. The functional test espoused by the commentators could operate only in the context of service custom. Professor Dudley therefore explained that each case was decided

> according to the circumstances of each case, by the court-martial trying it, in accordance with the

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[314] Army Dig. Op., 1880, sec., at 38.

[315] W. Winthrop, supra note 49, at 712-13.

[316] Although dismissal was not mandatory in the Navy for unbecoming conduct, which was prosecuted under the Navy's single general article, this functional test appears to have operated in officer cases, especially those alleged as scandalous conduct. See, e.g., United States v. Grimes, G. O. 150 at 3 (Navy 1870), where the circumstances of an officer's failure to pay a debt "are of a character so scandalous as to render the sentence of dismissal both just and imperative."

> recognized customs and usages of the service and the general sentiment of the Army and community at large as to what is accepted as morally unbefitting and unworthy in a man of honor; that is to say a man of a high sense of justice, an elevated standard of morals and manners, and the corresponding deportment, which constitute the "gentleman" which every officer of the Army is bound by law to be.[317]

Davis pointed out that the standard expected of an officer and gentleman is merely military custom applied to the specific facts in each case:

> The effect of the Article is to establish a standard of conduct in respect to commissioned officers of the Army, and to give to material departures from such standard the character of serious military offenses. The particular acts or classes of acts which constitute such departures from the standard established in the Article are determined in part by custom of service and in part, ... by an application of the terms of the Article to particular acts or omissions which are set forth in the charges and specifications.[318]

Unbecoming conduct, like prejudicial conduct, was a body of jury-made law, with the court-martial members drawing on their knowledge of military customs concerning the deportment expected of officers and the potential effects of officer misconduct on military society. As DeHart summarized in 1846:

> The article in question does not particularize any species of conduct as unbecoming an officer and a gentleman, but leaves that to be determined by the opinions of the world, or by those of the court-martial, from the acts alleged, and from which the military community might be prejudiced or receive detriment, were it to countenance behavior in any

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[317] E. Dudley, supra note 306, at 409 (emphasis added).

[318] G. Davis, supra note 15, at 468.

of its members which was of such a nature as to involve scandal and infamy.[319]

3. The Scope of Unbecoming Conduct

Given the central role of the court-martial members in establishing the standards of conduct expected of an officer, and in measuring an accused's actions against such a customary standard, it is not surprising that during the formative years of American general articles law a wide variety of misconduct was held to be unbecoming conduct. Colonel Winthrop's treatise cited 68 distinct examples of unbecoming conduct, grouped into 28 general categories. His list, although fairly representative of Army unbecoming conduct cases, did not include Navy courts-martial, which generally included a slightly broader scope of impropriety under unbecoming conduct, reserving the more outrageous

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[319] W. DeHart, supra note 17, at 371 (emphasis added). DeHart did not explain what "the opinions of the world" were. Presumably he was alluding to a universal moral or ethical consensus common to both military and civilian societies, which the court-martial members would apply along with specialized military customs and values. Note the subtle relationship DeHart drew between unbecoming conduct and prejudicial conduct ("from which the military community might be prejudiced or receive detriment"), as well as the possible suggestion of service discredit ("were it to countenance behavior in any of its members which was of such a nature as to involve scandal or infamy.").

incidents for prosecution as scandalous conduct.[320] Most unbecoming conduct cases during this period could be classified into one of seven broad categories. Like the categories of prejudicial conduct described previously,[321] each of the following classifications involved the breach of a standard of personal honor, decorum, or deportment customarily expected of officers. Some of the categories correspond to classes of prejudicial conduct; in such cases, the only distinguishing characteristic was often the enlisted status of the accused convicted of prejudicial conduct, which made him immune from prosecution for unbecoming conduct.[322] Another reason for the similarities between the categories of prejudicial conduct and unbecoming conduct was that prejudicial conduct was recognized as a lesser included offense

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[320]The Navy did not seem to prosecute unbecoming conduct as such to the same relative extent as did the Army. Most of the cases between the Civil War and World War I that involved conduct that would have been prosecuted as unbecoming conduct in the Army were prosecuted as scandalous conduct in the Navy, although it was also common Navy practice to prefer two charges arising out of the same misconduct: one, under A.G.N. 8, alleging scandalous conduct; and the other, under A.G.N. 22, alleging conduct unbecoming an officer and gentleman. See, e.g., United States v. Coghlan, G.C.M.O. 209 (Navy 1876). The accused wrote and mailed a "profane, scurrilous, and ungentlemanly" letter to a Navy clerk. He was convicted, under Charge I, of unbecoming conduct "in violation of his duty as a gentleman, and of the laws of decency, decorum, and morality, which are incumbent upon every officer in the Naval service", and, under Charge II, of scandalcus conduct, by which he violated "good morals, and set an evil example to others in like manner to offend."

[321]Part III-B-2, supra.

[322]See W. Winthrop, supra note 49, at 732. Conduct that, if committed by an officer, would be punished as unbecoming conduct was prosecuted as prejudicial conduct when committed by enlisted men.

of unbecoming conduct. Thus, an officer whose misconduct was not so serious as to compromise his standing as an officer could be convicted of prejudicial conduct for the same transgression.[323]

By 1900, then conduct unbecoming an officer and a gentleman could be divided into the following seven broad, and occasionally overlapping, classifications:

1. Frauds and falsifications. These included specific offenses such as knowingly making false official statements or accounts;[324] defamatory statements, especially concerning another officer;[325] and other "[a]cts of fraud or gross

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[323] Id. at 719; see, e.g., United States v. Meade, G.C.M.O. 29 (Navy 1882)(abusive language and fighting with another officer in the presence of enlisted men not unbecoming under the circumstances, but prejudicial to good order and discipline). Many such convictions of the lesser included offense appear to have been acts of jury nullification, for Winthrop admonished: "The penalty being thus imperative, the court, where an offence duly charged under the Article is fully established, cannot properly evade its responsibility as to the sentence by finding the accused guilty only of 'Conduct to the prejudice of good order and military discipline,' and affixing a lighter punishment. It must find according to the testimony and attach the statutory sentence, those members who consider this too severe joining, if desired in a recommendation for commutation." W. Winthrop, supra note 49, at 720 (emphasis in original).

[324] Id. at 713; see United States v. Seely, G.O. 148 (Navy 1869)(deliberate misrepresentation to commanding officer that two sailors had not been given" unlawful and cruel punishments and tortures", probably flogging).

[325] W. Winthrop, supra note 49, at 713-14.

falsity, cheats, or other corrupt conduct".[326]

2. Abuse or compromise of rank. Officers are expected to look out for the welfare of their subordinates, not victimize them. Thus, largest areas of unbecoming conduct law involved abuses of one's military position and other acts inconsistent with one's position, such as: extortion of enlisted men;[327] usury against enlisted men;[328] mistreatment of subordinates;[329] and fraternization with subordinates.[330]

3. Compromise of personal honor or reputation. This class included the often vaguely articulated transgressions against the code of the gentleman, especially involving the

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[326] Id. at 716, citing examples such as: fraudulently drawing rations for one's wife; fraudulent overcharges by a commissary officer to food sold to soldiers and officers; cheating at cards; and taking leave intended for another officer. See, e.g., United States v. Harman, C.M.O. 10-1917 (Navy 1917)(paymaster taking advantage of mistake by tradesman who delivered to ship's store articles of greater value than those ordered, and failure to notify the tradesman promptly of the mistake). Most frauds committed by naval officers were prosecuted as scandalous conduct.

[327] W. Winthrop, supra note 49, at 716, n. 45.

[328] Id.

[329] Id. at 715, n. 53. See, e.g., United States v. McCalla, G.C.M.O. 29 (Navy 1890)(threatening to kill a seaman apprentice with a sword if he smiles); United States v. Semmes, G.O. 168 (Navy 1872)(administering cruel and illegal punishment).

[330] W. Winthrop, supra note 49, at 716, citing examples such as drinking, gambling, and "unbecomingly familiar association" with enlisted men.

dishonorable failure of an officer to fulfill an obligation, such as a dishonorable failure to pay a just debt,[331] or violation of a formal pledge,[332] or other violation of personal or official trust.[333]

4. Immoral behavior. A variety of violations of the sexual and social taboos were prosecuted as unbecoming conduct; although the unbecoming aspect in most cases was not so much the moral depravity evidenced by the behavior itself, but the accused officer's indiscretion in getting caught. Examples of such cases include bigamy, public association with a notorious prostitute, and frequenting a house of ill-

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[331] Id. at 715, n. 42; see, e.g., United States v. Braunersreuther, G.C.M.O. 36 (Navy 1881). Cf. United States v. Grimes, G.O. 150 (Navy 1870)(borrowing $200 from wardroom steward, an enlisted man, depositing one's commissions as security for the debt, and failing to repay same held to be scandalous conduct).

[332] W. Winthrop, supra note 49, at 718, citing examples of violations of formal pledges not to drink and not to enter a gambling house; see, e.g., United States v. Frary, G.C.M.O. 31 (Navy 1882)(violation of pledge not to drink). Cf. United States v. Hartrath, G.C.M.O. 21 (Navy 1894)(violation of abstinence pledge prosecuted as scandalous conduct).

[333] W. Winthrop, supra note 49, at 714, citing numerous examples of violations of finanical or fiduciary trust. In the Navy, most serious violations of financial trust were prosecuted as scandalous conduct. See, e.g., United States v. Fisher, G.C.M.O. 10 (Navy 1889)(misappropriation of company fund to buy haycutter for personal use); United States v. Marstin, G.O. 67 (Navy 1865)(Marine lieutenant colonel's embezzlement of $8,000 from enlisted men's money entrusted to him for safekeeping). Cf. United States v. Masten, G.O. 149 (Navy 1870)(failure by paymaster to make accounting upon detachment).

fame in uniform.[334]

5. Drunken misconduct. Drunken, disorderly behavior in public or in the presence of enlisted men, was considered a very serious breach of the standard of conduct expected of an officer; although drunkenness by itself, without any accompanying unseemly behavior, was not generally considered to be unbecoming conduct.[335]

6. Disgraceful public behavior. This general classification would include a variety of public misconduct, not involving liquor or sexual mores, that tends to discredit the officer. Examples would include public altercations;[336] wanton damage or destruction of the property of civilians,[337] use of provoking, abusive, obscene, or vulgar language,

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[334] W. Winthrop, supra note 49, at 718, n. 54. By contrast, the Navy during this period did not appear to prosecute sexual misconduct as vigorously as did the Army, although by 1917 some particularly outrageous acts were being prosecuted as scandalous conduct. See, e.g., United States v. West, C.M.O. 24-1914 (Navy 1914)(requesting another officer to procure a woman for illicit intercourse); United States v. Carpenter, G.C.M.O. 121 (Navy 1897)(homosexual acts with a sailor).

[335] W. Winthrop, supra note 49, at 717. See, e.g., United States v. Strong, G.C.M.O. 19 (Navy 1887)(drunken, disorderly conduct while ashore on the foreign concession at Canton, China "so as to excite general remark").

[336] W. Winthrop, supra note 49, at 714; see e.g., United States v. Huff, C.M.O. 26-1914 (Navy 1914)(fighting with a civilian in a hotel).

[337] W. Winthrop, supra note 49, at 178.

especially toward subordinates or civilians;[338] and other "disorderly or violent conduct of a disreputable character in public".[339]

7. Commission of a civilian felony. Although such prosecutions as unbecoming conduct were rare in the Navy, the Army frequently prosecuted officers for committing civilian felonies, such as larceny, receiving stolen property, robbery, and homicide.[340]

Perhaps to even a greater extent than with prejudicial conduct, conduct unbecoming an officer and a gentleman remained rooted in custom. The court-martial of an officer charged with unbecoming conduct was in some ways like a tribal rite, by which the offending officer would be cast out of the society of officers for violations of the unwritten code of conduct. Other than the somewhat vague guidance provided by treatises such as Winthrop's, the court-martial members were left to their own sense of propriety and knowledge of military customs governing officer conduct. Therefore, the law of unbecoming conduct demonstrated the same expansive growth in the nineteenth and early twentieth centuries, as the military courts were faced

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[338] Id. at 714; see, e.g., United States v. Mintzer, G.C.M.O. 23 (Navy 1886) (obscene, vulgar, profane, and abusive language, also charged as scandalous conduct); United States v. Fitzsimmons, G.C.M.O. 31 (Navy 1881) (profane, abusive and insulting language at mess).

[339] W. Winthrop, supra note 49, at 718.

[340] Id.

with novel situations.

Indeed, custom may well have had an even more pronounced expansive effect in unbecoming-conduct law than in prejudicial conduct. In the latter body of law, military courts were usually punishing conduct long recognized as detrimental to discipline; and, as by the close of the nineteenth century a substantial body of case precedent had developed. In unbecoming conduct, however, the governing customs were more vaguely conceptualized and articulated in terms of honor, disgrace, and position. As such, they were more susceptible of application to a broader range of specific conduct.

Unbecoming conduct also required a more careful application of custom than appears to have been the practice in prejudicial conduct cases. Identical conduct could be highly dishonorable and unbecoming in one set of circumstances, yet not unbecoming in another somewhat similar situation. By contrast, conduct prejudicial to discipline in one situation was frequently prejudicial in all similar circumstances. Thus, because of the nonspecific nature of the customs applied, and the resulting need for a discriminating analysis of the facts in each case the trial of an unbecoming conduct case was an operation of military common law, through the reliance on service custom as a source of substantive law and the application of custom to novel factual circumstances, thus expanding the substantive scope of

unbecoming conduct.

D. Service-Discrediting Conduct

Although some scholars[341] suggest that service discrediting conduct was new with the 1916 Articles of War, the concept of service discredit clearly operated in American military law throughout the nineteenth century.

The first such manifestation of the concept in the nineteenth century was in the prejudicial conduct cases, especially in the Army. The expansive pressure that built up in the prejudicial conduct law, especially in cases involving civilian crimes that had not apparent relation to military discipline, has already been explored.[342] In reading these cases, especially the ones after 1880, the core value that can arguably support many of the convictions is not a direct and palpable impact on discipline, but rather the potential complications that embarrassing or discrediting conduct by soldiers and sailors can pose for the accomplishment of mission. This was particularly true on the frontier, where the military and civilian populations lived in a close, symbiotic relationship.

The concept of service discredit was also a frequent undertone in unbecoming conduct cases. One of the operational

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[341] See, e.g., Hagan, supra note 23, at 74-77; see generally Comment, An Unrestricted Anachronism, supra note 24, at 825-34.

[342] Part III-B-3, supra.

definitions of unbecoming conduct was that it shamed or embarrassed officers as a class, both within the military organizations, as in offenses involving disgraceful conduct in the presence of enlisted mem, and in civilian society, as suggested by the many convictions for public disorders and immoral behavior. DeHart, exhibiting a global view rare among nineteenth century commentators, identified two core values in unbecoming conduct law: unbecoming conduct's "tendency to affect good order and military discipline" and its "moral turpitude of such a kind as would reflect discredit upon the military community."[343] Moreover, DeHart viewed service discredit as one of two alternate conceptual requirements for conviction of unbecoming conduct:

> In every prosecution before a court-martial for conduct unbecoming an officer and a gentleman, the degree of the offence must be such as to reflect discredit upon the body of the army, or the nature of it such as to militate against the requirements of good order and military discipline...[344]

Colonel Winthrop also recognized the role of service discredit in unbecoming conduct, which "at the same time must be of such a nature or committed under such circumstances as will bring dishonor or disrepute to the military profession..."[345]

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[343] W. DeHart, supra note 17, at 377.

[344] Id. at 373-74.

[345] W. Winthrop, supra note 49, at 711-12; see also Comment, An Unrestricted Anachronism, supra note 24, at 825-27, wherein a student commentator suggests that the discredit clause of Article 134, U.C.M.J., may have evolved from the "higher code" applicable to officers.

In the Navy, service discredit was implicit in many scandalous conduct prosecutions. Scandalous conduct specifications frequently alleged discredit or disgrace to the service. For example, in 1884 a group of Navy enlisted men were convicted of scandalous conduct arising out of their "riotous, disorderly, and violent" behavior as passengers aboard a civilian steamer, intimidating and disturbing other passengers "to the great scandal and disgrace of the naval service."[346] Other examples of service discrediting scandalous conduct include violation of procurement procedures and conflicts of interest in procurement of government supplies;[347] and contempt of a state court, failure to repay a civilian who posted bond for the officer, and failure to pay one's civilian attorney.[348] By 1900, allegations of service discredit or disgrace had become common boilerplate language in scandalous conduct specifications.

Therefore, service discredit was an active concept in general articles law well before its codification in the Articles of War of 1916. Whether the immediate, purpose of including "all conduct of a nature to bring discredit upon the military service" in A.W. 96 of 1916 was to recognize an already active concept in military law is highly

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[346]United States v. Lind and Oliver, G.C.M.O. 39 (Navy 1884).

[347]United States v. Smith, G.C.M.O. 8 (Navy 1886).

[348]United States v. Jounson, G.C.M.O. 24 (Navy 1886).

speculative. The legislative history of the 1916 code points to other concerns as prompting the addition. The Judge Advocate General of the Army explained the sole purpose of the service discredit language as being to extend court-martial jurisdiction to retired personnel:

> We have a great many retired noncommissioned officers and soldiers distributed throughout the body of our population and a great many retired officers. If the retired officer does anything discreditable to the service or to his officer position we can try him... for "conduct unbecoming an officer and a gentleman". We cannot try the noncommissioned officer or soldier under that article, nor can we try him for conduct prejudicial to good order and military discipline; because the act of a man on the retired list, away from the military post, cannot be reasonably said to affect military discipline. I threw in that language to cover the cases of those men.[349]

Even if this was the single purpose of the 1916 legislation, its effect was not so limited. Service discredit, which had previously operated sub silentio in Army military law, became a substantive firestorm.[350] The 1917 Manual for Courts-Martial described the purpose quoted above as a "principal object" of the phrase, but also noted that there was "a limited field for the application of this part of the general article to soldiers on the active list in cases where their discreditable conduct is not punishable

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[349] Revision of the Articles of War, 1912-1920, at 83 (n.d.), quoted in Hagan, supra note 23, at 75.

[350] James Hagan has carefully documented the rapid expansion of the substantive limits of service discrediting conduct after 1916, particularly with respect to commission of state or local crimes. See id. at 74-78.

by any specific article or by the other parts of the general article."[351] By 1928, the Manual had relegated the Judge Advocate General's "single purpose" even further, from a "principal purpose" down to little more than an afterthought.[352] The 1921 Manual even suggested that violations of state or local laws were service discrediting per se, although this position was modified considerably in the 1928 edition.[353]

With the possible exception of violations of state and local criminal laws--which notwithstanding the cautions of the 1928 Manual for Courts-Martial were generally regarded by military courts prior to the mid-1950s as discrediting per se--service discredit law operated in the same common law way as did prejudicial conduct and unbecoming conduct. The accused's conduct was, in theory at least, assessed according to customs concerning disgrace to the military service and its reputation in the civilian community. Not surprisingly, the scope of conduct punishable as service discrediting mushroomed between 1916 and 1951. The Army military justice system gave birth to dozens of "new" offenses under

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[351] M.C.M., 1917, para. 446, at 283 (emphasis added).

[352] M.C.M., 1928, para. 152b, at 188: "One object of including this phrase in the general article was...".

[353] M.C.M., 1921, para. 446, at 642-63; cf. M.C.M., 1928, supra note 353: "Instances of such conduct on the part of persons subject to military law may include acts in violation of local law committed under such circumstances as to bring discredit upon the military service." (emphasis added).

military law, most of them sounding in service discredit. Many of these offenses were ones that had a long history of being prosecuted as unbecoming conduct--particularly offenses involving immoral behavior or disgraceful public conduct[354]--or under attenuated theories of prejudice to good order and discipline.

On the other hand, there did not appear to be the same careful consideration of the facts of each case as was demonstrated in unbecoming conduct. Unlike unbecoming conduct; many of the service discrediting offenses were so aggravated that it would be almost impossible to hypothesize circumstances under which they would not tend to discredit the military. Thus, by 1951, a substantial and somewhat inflexibly applied body of case precedent had developed. Custom of the service was invoked only when a court-martial was confronted with an offense truly hitherto unknown to military law.

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[354] See, e.g., M.C.M., 1949, para. 117c at 138-142, which lists general articles offenses sounding in service discredit such as adultry, indecent assault, assault with a dangerous weapon, assault on a female under age 16, negligent homicide, bad check offenses, drunken driving, pandering, receiving stolen goods, and wrongful carnal knowledge with a famale under age 16.

## IV. THE ROLE OF CUSTOM UNDER THE UNIFORM CODE OF MILITARY JUSTICE

### A. The Two Meanings of Custom

As the three major classes of general articles offenses emerged from military common law and were crystallized in the general articles, custom not only provided the legal standards against which individual conduct would be measured in general articles cases, but it also permitted a continuing expansion of the substantive scope of prejudicial conduct, unbecoming conduct, and service discrediting conduct. Rather than limit the scope of the general articles, custom allowed the substantive boundaries of general articles law to be elastic.

Under the Uniform Code of Military Justice, custom of the service continues to perform its historic function as a source of substantive military law. The misunderstanding of custom's effect on military law, such as is reflected in Parker v. Levy, is due to the practice of military appellate courts to invoke custom in two distinct ways, each with its own particular meaning. One meaning of custom is best summarized by the phrase "legal custom." This is simply military case precedent. The other meaning given to custom by the military appellate courts is that of custom in its common law sense, operating as it did in nineteenth century

military law, enforcing the values, norms, folkways, and traditions of the service. This second type of custom may be called "societal custom" in that it reflects values and usage of military society.

It is very important to understand which type of custom is being invoked in a given case, because each meaning has its own implications for the determination of criminality under the general articles. Legal custom generally has tended to limit the scope of the general articles, while societal custom has continued, as it did in the nineteenth century, to be an expansive force. Invocation of legal custom usually implies, at the appellate level, a characterization of whether an accused's conduct is, for example, prejudicial to good order and discipline as a legal issue freely reviewable on appeal. Reliance on societal custom, on the other hand implies that this issue is one of fact to be determined by the trial court, and reversible only if clearly erroneous.

### B. Custom Confused: Legal Custom and the Per Se Characterization of General Articles Misconduct

Appellate decisions under the Uniform Code have frequently confused custom with military case precedent. Under legal custom analysis of a general articles case, whether particular conduct is cognizable under Article 133 or 134 is decided by inquiring whether the conduct has customarily been prosecuted under the general articles, and not whether

the conduct, under the circumstances, prejudiced discipline, tended to discredit the service, or was unbecoming. Although this distinction is subtle, it is very important.

Legal custom dominated the numerous general articles cases of the early 1950s. One of the leading examples of the invocation of legal custom to decide an Article 134 case was United States v. Messenger[355] in 1952. Messenger was convicted of impersonating an officer, and the Court of Military Appeals affirmed, holding such impersonation to be prejudicial to good order and discipline. After referring to Winthrop[356] and early case precedent upholding convictions for impersonation under the general articles, the court concluded: "It requires little imagination to conclude that a spirit of confusion and disorder, and lack of discipline in the military would result if enlisted personnel were permitted to assume the role of officers and masquerade as persons of high rank."[357] Impersonation had been traditionally prosecuted under the general articles and, the court seemed to suggest, was per se prejudicial to good order and discipline. The court was apparently not detained by the specific facts in Messenger's case, which had persuaded the Navy Board of Review to hold that he had not,

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[355] 2 C.M.A. 21, 6 C.M.R. 21 (1952).

[356] W. Winthrop, supra note 49, at 726.

[357] United States v. Messenger, 6 C.M.R. at 25.

under the circumstances, committed an offense.[358] Messenger did not intend to deceive anyone about his rank, and the impersonation was apparent on its face. Everyone who saw Messenger knew he was not an officer, and there was no appreciable publicity attendant to the impersonation. In short, it was nothing more than an office prank. Nonetheless, the Court of Military Appeals considered such exculpatory factors to be irrelevant, and held that the offense of impersonation requires neither an intent to gain any benefit from the impersonation, not actual deception of another person.

In some of the early cases under the Uniform Code, legal custom was invoked by analogy or extension. In United States v. Snyder,[359] for example, the Court of Military Appeals considered whether "wrongful and unlawful attempted enticement of another member to engage in intercourse with a woman to be sent to him by the accused" was an offense under Article 134. The court rejected the accused's contention that his conduct was closely related to "simple fornication", which, because it involved no discreditable circumstances and did not directly prejudice good order and discipline, had customarily not been recognized as a general articles offense. Instead, the Court characterized Snyder's

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[358] NCM 3-51-S-367 (unreported 1951).

[359] 1 C.M.A. 423, C.M.R. 15 (1952).

actions as "extremely close" to pandering, which had been customarily prosecuted as prejudicial conduct. The only element of pandering missing was financial gain to the accused, proof of which was not required to sustain the conviction. The court concluded that Snyder's misconduct "clearly evinced to his fellow corpsmen a wanton disregard for a moral standard generally and properly accepted by society. We certainly cannot say--comparing this act with others condemned by service custom--that it does not constitute a manifest example of conduct prejudicial to good order and military discipline."[360] Although the court invoked "service custom", it was actually referring to military case precedent punishing pandering, and rejected Snyder's similar invocation of precedent to characterize his conduct as legally indistinguishable from discrete, off-duty fornication with a civilian. Snyder is therefore an example of legal custom allowing the judicial recognition of a novel general articles offense: fixing someone up with a hot date.

In some of the early cases, legal customs of the several services conflicted. In United States v. Kirchner[361] the Court of Military Appeals had to choose between the legal custom of the Army to prosecute negligent homicide as a general articles offense and the Navy's absence of such a

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[360] Id., 4 C.M.R. at 19.

[361] 1 C.M.A. 477, 4 C.M.R. 69 (1952).

practice. Kirchner, a Marine, contended that his conviction was improper because since he was a member of the Marine Corps, the customs of the Department of the Navy governed. While the court agreed that "it is true, as argued by the defense, that Article 134, supra, must be interpreted in light of existing service customs and usages",[362] it was not limited to the precedents of the accused's branch of servie, especially since all the services now operated under a common body of criminal law, the Uniform Code. Citing Winthrop and earlier Army cases, as well as the 1951 Manual for Courts-Martial--the first applicable to all the services--the court ruled that negligent homicide was an Article 134 offense, under either

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[362] Id., 4 C.M.R. at 70.

prejudicial conduct or service discrediting theories.[363]

One commentator has sharply criticized the legal custom approach taken by the Court of Military Appeals in the early 1950s. According to James Hagan, it usurped the prerogatives of the court-martial, which had been empowered by Congress to determine "apparently without limitation to any previously recognized and punishable offense" whether the conduct in each case was prejudicial to good order and discipline, service discrediting, or unbecoming an officer and a gentleman.[364] Hagan viewed such reliance on case

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[363]Other examples of the invocation of legal custom in early Art. 133 and Art. 134 cases include: United States v. Eagleson, 3 C.M.A. 685, 14 C.M.R. 103 (1954)(reckless driving); United States v. Long, 2 C.M.A. 60, 6 C.M.R. 60 (1952)(assaulting a witness); United States v. Herndon, 1 C.M.A. 461, 4 C.M.R. 53 (1952)(receiving stolen property); United States v. Downard, 1 C.M.R. 405 (A.B.R. 1951), rev'd on other grounds, 1 C.M.A. 346, 3 C.M.R. 80 (1952)(beating and using abusive, obscene language to one's wife at an officers' club); United States v. Andrews, 9 C.M.R. 667 (A.B.R. 1953), petition for review denied, 3 C.M.A. 815, 10 C.M.R. 159 (1953)(wrongful cohabitation); United States v. Yamat, 8 C.M.R. 356 (A.B.R. 1952)(filing false certificate to obtain payment of a claim).
The absence of a legal custom was an important factor in the following early U.C.M.J. cases, which held that the specified conduct was not an offense under the general articles: United States v. Gillin, 8 C.M.A. 669, 25 C.M.R. 173 (1958)(automobile held not to be, as a matter of law, the subject of an unlawful entry under Article 134); United States v. Wasluski, 6 C.M.A. 724, 21 C.M.R. 46 (1956)(passenger fleeting scene of an accident); United States v. Kirksey, 6 C.M.A. 556, 20 C.M.R. 272 (1955)(negligent failure to pay just debts); United States v. Downard, 6 C.M.A. 538, 20 C.M.R. 254, 257 (1955)(negligent failure to maintain sufficient funds in checking account not established as an offense in "that which might roughly be called the common law of the military establishment); United States v. Lefort, 15 C.M.R. 596 (C.G.B.R. 1954)(possession of narcotics paraphenalia).

[364]Hagan, supra note 23, at 87.

precedent as being contrary to the fundamental nature of military common law:

> These decisions disclose a search by the appellate bodies into prior practice, custom, state law, and common law concepts of crimes and defenses, or a reliance on the Manual provisions, to ascertain whether the conduct amounts to a violation of the article. The fact that the court-martial supposedly found sufficient nexus between the conduct and its effect to characterize it as a "disorder and neglect" or a "service discredit" has been of little or no importance in determining whether the conduct amounts to an offense.[365]

The reliance by appellate courts on legal custom in general articles cases, rather than habitually deferring to the factual determination of the court-martial members' role. Between 1917 and 1951 the influence of the Manuals, Digests of Opinions, and treatises had steadily grown as members of courts-martial, without any legal training or instruction, turned to them for guidance.

The Manual for Courts-Martial and its Navy counterpart, Naval Courts and Boards, gave an aura of official sanction to the examples of general articles offenses discussed therein. Both publications contained the official Table of Maximum Punishments, which listed the maximum punishments authorized for various offenses, as prescribed by the President. As new offenses were recognized by military courts, many of them would be listed in subsequent tables, in the textual discussions of the general articles, and in sample specifications. The 1917 Manual, for example,

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[365] Id. at 88.

listed 48 offenses under the general artilces in its Table of Maximum Punishments.[366] By 1949, the number had jumped to more than 70.[367] Naval Courts and Boards listed 36 offenses under A.G.N. 22 in the table in its 1917 edition, and 137 in its 1937 version.[368] Even though many of the offenses formerly presecuted under the general articles have been codified as separate punitive articles under the Uniform Code,[369] the current Manual for Courts-Martial lists 73 distinct general articles offenses in its Table of Maximum Punishments.[370]

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[366] M.C.M., 1917, para. 349, at 165-67.

[367] M.C.M., 1949, para. 117c, at 138-142. It should be noted that the 1949 Manual, the last one applicable only to the Army, was the only major revision of the Manual for Courts-Martial since 1928. The Judge Advocate General of the Army explained that the changes incorporated in 1949 were "indicated by experience during the twenty years since the promulgation of the Manual for Courts-Martial, 1928, particularly that gained during World War II." Id. at vii.

[368] Naval Courts and Boards, 1917, sec. 390, at 222-224; Naval Courts and Boards, 1937, sec. 457, at 237-240. Most of the offenses listed in the 1937 edition were civilian federal crimes which, as in the Army, were punishable under the general article.

[369] E.g., conspiracy, not prohibited by Art. 81, U.C.M.J., 10 U.S.C. sec. 881; assault with a dangerous weapon, now Art. 128, U.C.M.J., 10 U.S.C. sec. 928; assault upon a commissioned officer, now Art. 128, U.C.M.J., sec. 928; bad check offenses, now Art. 123A, U.C.M.J., 10 U.S.C. sec. 923A; drunken or reckless driving, now Art. 111, U.C.M.J., sec. 911; wrongful appropriation, now Art. 121, U.C.M.J., 10 U.S.C. sec. 921.

[370] M.C.M., 1969 (Rev.), para. 127c, at 25-15 through 25-17. The current Table of Maximum Punishments lists no unbecoming conduct offenses. The maximum authorized punishment is that provided for the most closely related offense listed in the table under another punitive article. If no listed offense is closely related, the court must then turn to the Title 18 of the U.S. Code to find a closely related offense, and applies the punishment provided.

The Manuals and their naval counterparts also set out sample specifications for the more common general articles offenses. These were intended to allow clerks, legal officers, and court-martial members--all of whom were not usually lawyers--to draft specifications and findings that were in proper form and alleged all the necessary elements of each offense. Winthrop, for example, listed three sample specifications for unbecoming conduct[371] and seven for prejudicial conduct,[372] all of which were taken from actual cases. By 1917, the number of unbecoming conduct specifications had grown to nine, and 51 samples were given for general articles offenses under A.W. 96.[373] The 1949 Manual listed six samples for unbecoming conduct, substantially unchanged from 1917, but the samples for prejudicial and service discrediting conduct had increased to 74.[374] The current Manual lists four sample specifications for unbecoming

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[371] W. Winthrop, supra note 49, app. XX, at 1021-1022. Winthrop's samples reflected the tone of military service in the post-Civil War years: false report of an unsuccessful expedition against hostile Indians; dishonorable failure to pay just debts; and violation of a formal pledge not to drink.

[372] Id. at 1022, alleging: absence leave; neglect of duty in a battle against Indians; disorderly conduct and fighting with another officer in the presence of enlisted men; abusing one's horse; negligently allowing prisoners to escape; and fraudulent enlistment.

[373] M.C.M., 1917, app. 4, at 335-352A. The Indians had retreated to the reservation and out of the sample specifications, thus closing a colorful chapter in the history of military law; but Winthrop's abused horse survived.

[374] M.C.M., 1949, app. 4, at 327-333.

conduct,[375] and 62 samples for Article 134 offenses.[376]

Because the Manuals and Naval Courts and Boards were relatively comprehensive, highly practical guides to military law and court-martial procedure, they were--and to some extent still are--given more weight in matters of substantive law than was strictly warranted. The President's authority to set the maximum authorized punishment for offenses carrying no stated punishment in the Articles of War and Articles for the Government of the Navy was derived from his constitutional powers as Commander in Chief.[377] The legal effect of the various Executive Orders prescribing maximum punishments was procedural, not substantive; for the Executive Orders could not actually create new offenses under the general articles. Instead, the Tables of Maximum Punishments and the sample specifications merely referred to offenses already recognized by military courts as punishable under military common law. In matters of substantive law the Manuals were, and still are, of no more legal effect than any learned treatise on criminal

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[375] M.C.M., 1969 (Rev.), app. 6c, at A6-20, alleging: dishonorably copying or using another's examination paper; drunk or disorderly in uniform to the disgrace of the armed forces; dishonorable failure to pay just debts; and dishonorable failure to keep a promise to pay a debt.

[376] Id. at A6-20 through A6-26. Winthrop's abused horse lives on in sample 126, "abusing a public animal."

[377] U.S. Const., art. II, sec. 2, cl. 1.

law.[378]

Technical niceties aside, over the years the Manuals nonetheless assumed a dominant role in substantive military law. Military courts habitually deferred to the Manuals in substantive issues.[379] Although such habitual adherence to the Manuals has triggered close appellate scrutiny of novel general articles offenses,[380] it has not always restricted "the very broad reach of the literal language of the articles" to the extent the Supreme Court suggested in Parker

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[378]For a recent application of this doctrine to the military law of mental responsibility, see United States v. Frederick, 3 M.J. 230 (C.M.A. 1977), which invalidated the M'Naghten-irresistable impulse rule of M.C.M., 1969 (Rev.), para. 120, and substituted the A.L.I. Model Penal Code standard.

[379]While usually expressing a preference for the Manual's substantive rules, military courts have carefully avoided characterizing them as binding. See, e.g., United States v. Kunak, 5 C.M.A. 346, 17 C.M.R. 346, 369, 370 (1954); United States v. Smith, 5 C.M.A. 314, 17 C.M.R. 314 (1954). Sample specifications cannot create offenses. United States v. Waluski, 6 C.M.A. 724, 21 C.M.R. 46, 53 (1956)(passenger leaving the scene of an accident). Samples that fail to allege all the elements of an offense are invalid. United States v. Brice, 48 C.M.R. 368 (N.C.M.R. 1973)(riot).

[380]See, e.g., United States v. Regan, 11 M.J. 745 (A.C.M.R. 1981)(falsely identifying self, throwing butter on the ceiling of a mess hall, and discharging Claymore mine before given the proper command); United States v. Caballero, 23 C.M.A. 304, 49 C.M.R. 594, 596 (1975)(possession of narcotics paraphenalia); United States v. Davis, 27 C.M.R. 908 (C.G.B.R. 1956)(removing fuses from fuse box). See generally, Lewis, Limitations Upon Prosecutions of Offenses Under Article 134, 9 A.F. JAG L. Rev. 35, 38-39 (1967). Cf. Cutts, Article 134: Vague or Valid?, 15 A.F. JAG L. Rev. 129, 142 (1974), which presents perhaps an exaggerated view of the Manual's role: "The author is firmly convinced that anyone wanting to know what is prohibited by Article 134 need only open the MCM...It is Article 134 complete with its Manual amendments that is to be assessed for vagueness." (emphasis added).

v. Levy.[381] To the contrary, the tendency to accept the listing of certain conduct in the Manual as making all such conduct per se prejudicial to good order and discipline, service discrediting, or unbecoming an officer expanded their reach by allowing convictions under the general articles of conduct that, under the specific circumstances, may not have actually been prejudicial, unbecoming, or service discrediting. This does not appear to be so much the result of a conscious usurpation by appellate courts of the court-martial's prerogatives, nor of an intellectually slovenly abdication of authority by the court-martial, but merely the natural consequences of relying on the considerable body of case precedent that had developed by the end of World War II, to the frequent exclusion of the factual analysis of each case that early court-martial practice contemplated.

### C. Custom Restored: The Return to Societal Custom

Societal custom is common law custom as it was used in nineteenth century military law. Courts-martial referred to the values, norms, folkways, and traditions of military society to establish standards of conduct, such as those expected of officers, and to identify conduct that jeopardized discipline or discredited the service. Although in the first half of the twentieth century societal custom was

[381] Parker v. Levy, 417 U.S. at 754.

gradually supplanted by legal custom in determining whether the accused's conduct in a given case was punishable under the general articles, since 1957 military law has returned to the nineteenth century concept and use of custom.

By the early 1950, the prosecution was not required in a general articles case to plead or prove that, as a factual matter, the accused's conduct was prejudicial to good order and discipline, service discrediting, or unbecoming. Such descriptive language was "nothing more than traditionally permissible surplussage" that added nothing to the legal effect of the specification.[382] Nor was such language an element of the offense that had to be proven beyond reasonable doubt. Thus, offenses such as drunkenness on base,[383] indecent exposure,[384] carnal knowledge,[385] bigamy,[386] false swearing,[387] and negligent homicide[388]

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[382]United States v. Marker, 1 C.M.A. 393, 3 C.M.R. 127, 134 (1952).

[383]United States v. Wahl, 5 C.M.R. 733 (A.B.R. 1952), petition for review denied, 2 C.M.A. 677, 6 C.M.R. 130 (1953).

[384]United States v. Anderson, 8 C.M.R. 212 (A.B.R. 1952), petition for review denied, 2 C.M.A. 675, 8 C.M.R. 178 (1953).

[385]United States v. Deese, 3 C.M.R. (AF) 307 (A.F.B.R. 1950).

[386]United States v. Weber, 13 C.M.R. 176 (A.B.R. 1953).

[387]United States v. Galloway, 8 C.M.R. 323 (A.B.R. 1952), aff'd, 2 C.M.A. 433, 9 C.M.R. 63 (1953).

[388]United States v. Robinson, 12 C.M.R. 860 (A.F.B.R. 1953), petition for review denied, 3 C.M.A. 839, 14 C.M.R. 228 (1953).

were held to be per se prejudicial to good order and discipline, or service discrediting, or both.

However, in 1957 the Court of Military Appeals, in United States v. Williams,[389] held that the prejudicial nature of the accused's conduct is a factual element of an Article 134 prejudicial conduct offense. The government had contended that Williams' unlawful use of narcotics was prejudicial to good order and discipline as a matter of law, and therefore this did not have to be pleaded, instructed upon, or established beyond reasonable doubt. While the court agreed that the language "to the prejudice of good order and discipline" need not be alleged in the specification, it was nonetheless a factual element of the offense that must be instructed upon by the law officer. United States v. Grosso,[390] decided the same year, and United States v. Gittens[391] in 1958 appeared to end the notion that some conduct could be prejudicial, service discrediting, or unbecoming as a matter of law.

The effect of the Williams-Grosso-Gittens line of cases was to return to the nineteenth century practice of the court-martial determining whether the accused's conduct was within the scope of the general articles. As summarized in the concurring opinion in United States v. Hunt:

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[389] 8 C.M.A. 325, 24 C.M.R. 135 (1957).

[390] 7 C.M.A. 566, 23 C.M.R. 30 (1957).

[391] 8 C.M.A. 673, 25 C.M.R. 177 (1958).

> In effect, when we submit the question of whether the accused's conduct was service discrediting to the court as an element of the offense, we are reverting to the practice of an earlier time when the members of a court-martial were the judges of both the facts and the law of a case arising under either of the general articles. Under such a doctrine an act is service discrediting whenever a court-martial and a convening authority consider it so...[292]

After 1957, then, general articles law returned to an emphasis on the facts and circumstances of the case as the predicate for liability under Articles 133 and 134 rather than legal custom or precedent. Military appellate courts began to demonstrate renewed deference to the convictions handed down by courts-martial in general articles cases, which now implied a factual finding beyond reasonable doubt that the accused's conduct satisfied the "terminal element" of Article 133 or 134. In United States v. Rowe,[393] for example, the Court of Military Appeals declined to overturn a conviction for service discrediting conduct arising out of the accused's failure, in violation of a North Carolina statute, to render assistance to his wife when she was injured in an automobile accident. The court stated that in order to be punishable under Article 134, a violation of state law must "in fact, and in law" be conduct of a nature to discredit the armed forces. Because the court-martial could have reasonably found, based on the evidence in the

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[392] 27 C.M.R. 557, 560 (A.B.R. 1958)(Crook, J.A., concurring).

[393] 13 C.M.A. 302, 32 C.M.R. 302 (1962).

case, that Rowe's conduct was service discrediting, the Court of Military Appeals would not disturb the conviction.[394] Another example of such deference to the court-martial's findings was United States v. Winton,[395] in which a conviction under Article 134 for submitting a forged recommendation for a loan to a credit institution was affirmed on the grounds that the court-martial could have reasonably found such conduct, under the circumstances, to be service discrediting.[396]

The view that some misconduct is so aggravated as to be, as a matter of law, prejudicial, service discrediting, or unbecoming has died a lingering death. Occasionally, even recently, military courts have discussed general articles offenses in terms and tones that suggest a reliance on legal custom and a per se characterization of the accused's conduct rather than a careful scrutiny of the circumstances to determine if the specific acts are prejudicial, service discrediting, or unbecoming.

One of the more puzzling cases in this regard was United States v. Hooper,[397] decided in 1958. Hooper, a

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[394] Id., 32 C.M.R. at 308.

[395] 15 C.M.A. 222, 35 C.M.R. 194 (1965).

[396] Cf. United States v. Wilson, 13 C.M.A. 670, 33 C.M.R. 202 (1963), in which similar conduct was held not violative of Art. 134 because the forged statement was not actually communicated to a third party.

[397] 9 C.M.A. 637, 26 C.M.R. 417 (1958).

retired rear admiral, was convicted of sodomy, unbecoming conduct, and service discrediting conduct arising out of his "publicly associating with persons known to be sexual deviates". The Court of Military Appeals, per Chief Judge Quinn, brushed aside Hooper's contention that since his homosexual liaisons occurred in private and were discrete, his conduct lacked the notoriety necessary to convict one of unbecoming conduct arising out of sexual misconduct. "The capacity of such association to dishonor or disgrace the accused as an individual, and seriously compromise his standing as an officer is patent", the Chief Judge concluded.[398] The court rejected a similar contention on the issue of service discredit, noting that Hooper's conduct was observed by law enforcement agents, one of whom was a woman, who had him under surveillance. Therefore these could not be considered private, non-discreditable acts.[399]

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[398] Id., 26 C.M.R. at 427.

[399] Robinson O. Everett, writing the year after Hooper was decided commented: "One thing especially disturbing about this opinion is its implication that conduct not otherwise service discrediting can become service discrediting because it is discovered by investigators and, therefore, is no longer completely private. There are very few parallels for holding that behavior becomes criminal simply because the policeman is alert enough to 'catch someone in the act'." Everett, supra note 22, at 145. Cf. United States v. Yeast, 36 C.M.R. 890 (A.F.B.R. 1966), petition for review denied 16 C.M.A. 655, 36 C.M.R. 541 (1966), in which, after a careful analysis of the facts of the case, charges arising from visiting and escorting enlisted men to a gay bar were held not unbecoming or service discrediting conduct, but specifications alleging a continued, notorious homosexual relationship and homosexual acts were affirmed.

Other post-1957 examples of general articles cases suggesting a per se approach to an accused's conduct include United States v. Caballero,[400] in which possession of narcotics paraphenalia was held as a matter of law not punishable as prejudicial conduct, and United States v. Kick,[401] which reaffirmed negligent homicide as an Article 134 offense. Kick was strongly based on "service customs" which turned out to be, in Chief Judge Fletcher's opinion for the court, extensive legal precedent and a general need to protect military members from negligence in the handling of dangerous instrumentalities that is commonplace in military life.[402]

"Custom" therefore still remains something of a confused concept in the appellate military courts. Although, as will be seen in the novel-offenses cases discussed later, "custom" is more frequently used in its common law, societal sense. Yet there are cases such as Kick in which custom is still confused with case precedent. At the trial level,

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[400] 23 C.M.A. 304, 49 C.M.R. 594 (1975).

[401] 7 M.J. 82 (C.M.A. 1979). A second issue in Kick was whether Congress had preempted prosecution of negligent homicide under Art. 134 by enacting Arts. 118 (murder) and 119 (manslaughter). The court found no evidence of a Congressional intent to preempt the field of homicide by enacting Arts. 118 and 119. Id., 7 M.J. at 84-87.

[402] Id., 7 M.J. at 84. See also United States v. Mayne, 39 C.M.R. 628, 629-30 (A.B.R. 1968)(acceptance of loan solicited at accused's request from subordinates per se prejudicial to good order and discipline).

however, the requirement that the accused's conduct must, as a factual matter, be found to be prejudicial, discrediting, or unbecoming has forced courts-martial to return to the use of societal custom that was the foundation of nineteenth century general articles law.

The return to societal custom has had two significant consequences. First, returning the decision of whether the accused's conduct is punishable under the general articles to the "practical men" of the court-martial has reinforced the "separate society" tradition, which during the 1960s and 1970s had come under heavy attack.[403] The second result has been to reopen the possibility for the same type of expansion of the scope of the general articles that occurred between the Civil War and World War I. No longer constrained by legal custom, courts-martial are once again free to impose punishment for novel general articles offenses by applying, in common law fashion, customs of the service to specific conduct. On the other hand, this expansive potential has been checked somewhat, especially since Parker v. Levy, by appellate skepticism.

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[403] See supra note 58. The "separate society" has become a commonly invoked rationale for a wide range of judicial decisions concerning the rights of military personnel. See, e.g., Brown v. Glines, 444 U.S. 348, 356-57 (1980) right to circulate petitions); Greer v. Spock, 424 U.S. 828, 837-38 (1976)(right to conduct Presidential campaign activities on base); Cortright v. Resor, 447 F. 2d 245, 246, 255 (2d Cir. 1971)(transfers of military personnel following anti-war activity); United States v. Middleton, 10 M.J. 123 (C.M.A. 1981)(search and seizure).

## D. Custom and Novel Offenses

The consideration of novel general articles offenses is perhaps the best modern demonstration of custom at work in military law. Since the enactment of the Uniform Code a number of cases have imposed criminal liability under the general articles for conduct that was neither mentioned in the Manual for Courts-Martial nor recognized by case precedent. Among these are such diverse and sometimes exotic misbehavior as: misrepresenting oneself to be a physician in order to induce enlisted wives to consent to a "physical exam";[404] setting fire to a commode seat in the barracks;[405] burning a building with intent to defraud an insurer;[406] window peeping at a trailer park;[407] showing stag movies to the troops;[408] being found in flagrante derelicto with an

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[404]United States v. Reed, 9 C.M.R. 396 (A.B.R. 1953), petition for review denied, 3 C.M.A. 810, 10 C.M.R. 159 (1953).

[405]United States v. Evans, 10 M.J. 829 (A.C.M.R. 1981), petition for review denied, 11 M.J. 350 (1981).

[406]United States v. Fuller, 9 C.M.A. 145, 25 C.M.R. 405 (1958).

[407]United States v. Clark, 22 C.M.R. 888 (A.F.B.R. 1956), petition for review denied, 7 C.M.A. 790, 22 C.M.R. 331 (1956).

[408]United States v. White, 37 C.M.R. 791 (A.F.B.R. 1966), petition for review denied, 16 C.M.A. 663, 37 C.M.R. 471 (1966).

enlisted man's wife;[409] borrowing from an enlisted man;[410] and group fornication.[411]

By far the leading novel offense case is United States v. Sadinsky,[412] decided by the Court of Military Appeals in 1964. Sadinsky was convicted under Article 134 for deliberately and wrongfully jumping into the sea from the flight deck of the aircraft carrier USS INTREPID. The Navy Board of Review disapproved the conviction, holding that the specification failed, as a matter of law, to allege an offense under the Uniform Code.[413] The Judge Advocate General of the Navy certified the case to the Court of Military Appeals pursuant to Article 67 of the Code.[414]

Sadinsky is a good example of the Court of Military Appeals deferring to the judgment of the court-martial. The court noted that the pleadings and the facts in the case eliminated any possibility that Sadinsky had slipped,

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[409] United States v. Lee, 4 C.M.R. 185 (A.B.R. 1952), petition for review denied, 1 C.M.A. 712, 4 C.M.R. 173 (1952).

[410] United States v. Calderon, 24 C.M.R. 338 (A.B.R. 1957).

[411] United States v. Berry, 6 C.M.A. 609, 20 C.M.R. 325 (1956).

[412] 14 C.M.A. 563, 34 C.M.R. 343 (1964).

[413] NCM 63-01488 (unreported 1963).

[414] Art. 67(b)(2), U.C.M.J., 10 U.S.C. sec. 867(b)(2), authorizes what is tantamount to a government appeal from decisions of the Courts of Military Review.

stumbled, fallen, or was pushed, off the flight deck. In fact, he had done a backflip. Moreover, Sadinsky had performed his stunt pursuant to a bet with his shipmates, whom he instructed to report that he had slipped off the edge. The incident occurred near nightfall, while the INTREPID was underway in heavy seas and was preparing for night air operations. Given such considerations, the court would not disturb the Navy court-martial's finding that such conduct, under its circumstances, was prejudicial to good order and discipline.

Another outstanding novel offense case was the 1957 decision in United States v. Holt.[415] Holt and his buddies operated a crooked bingo game at the recreation center of an Air Force base in France. He was convicted, inter alia, under Article 134 of wrongfully and unlawfully awarding bingo prizes to his confederates by calling false bingo numbers, and of receiving compensation for calling such false numbers. In a very insightful opinion, the Air Force Board of Review affirmed the conviction, holding that Holt's conduct violated Article 134 under either a prejudicial conduct theory or a service discredit theory. Rejecting the defense contention that any prejudice or discrediting tendency was too remote to constitute an offense, and that there was no precedent in military law for such convictions,

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[415] 20 C.M.R. 718 (A.F.B.R. 1956), aff'd, 7 C.M.A. 617, 23 C.M.R. 81 (1957).

the Air Force Board of Review provided the following explanation of the role of custom in shaping the scope of the general articles:

> [A]s the morals, laws, customs, usages, culture, organization and administration of a country or military service change, so also do those acts which are prejudicial or discrediting thereto... So, also, as the country and services change, the future will no doubt bring forth many violations of Article 134 which are not recognized today. So also, service sponsored bingo games are a relatively new activity in the Armed Forces, and the fact that prejudicial or discreditable acts resulting therefrom have not heretofore been characterized as military offenses is of little or no consequence.[416]

The issue was not one of legal custom or precedent but rather whether the facts of the case, and those reasonably inferable therefrom, specified conduct directly and palpably prejudicial to good order and discipline or of a nature to discredit the Armed Forces. "[T]he accused's acts are tainted with a breach of trust, dishonesty, lying and cheating in a specific and precise manner and concerning a recognized welfare activity of the Armed Forces."[417]

The absence of a service custom can also be important in a novel offense case. One of the best examples of an unsuccessful search for custom is United States v. Waluski.[418] The accused, a passenger in a vehicle involved in an accident in which a foreign national was killed, was convicted, inter

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[416] Id., 20 C.M.R. at 725.

[417] Id.

[418] 6 C.M.A. 724, 21 C.M.R. 46 (1956).

alia, of leaving the scene of an accident in violation of Article 134. While the Court of Military Appeals had no doubt that a driver's fleeing the scene can clearly discredit the service,[419] did a passenger's flight have the same consequence? The answer, according to Chief Judge Quinn, was to be found in service custom: "Ancient military customs can create standards of conduct. A violation of these standards is punishable under the general article."[420] No such service custom with respect to passengers could be found, although Judge Latimer, concurring in the result, would have found such a custom with respect to the senior officer present, riding as a passenger on a trip with an "air of officiality".[421] Waluski's conviction under Article 134 was therefore disapproved.[422]

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[419] Id., 21 C.M.R. at 53. The court clearly adopted a per se view of a military driver fleeing the scene of an accident, citing United States v. Eagleson, 3 C.M.A. 685, 14 C.M.R. 103 (1954).

[420] United States v. Waluski, 21 C.M.R. at 53.

[421] Id., 21 C.M.R. at 55 (Latimer, J., concurring in the result). Waluski was not, however, the senior officer present.

[422] See also, e.g., United States v. Smart, 12 C.M.R. 826 (A.F.B.R. 1953) (because of lack of governing service custom, being in the day room in the women's barracks at 3:00 A.M. not prejudicial to good order and discipline). Cf. United States v. Adams, 21 C.M.R. 733 (A.F.B.R. 1956) in which the accused was convicted of seven specifications of attempting to induce another airman to commit an act of masturbation, in violation of Art. 134. The Board agreed with Adam's contention that there was no custom of the service that had the force of law concerning masturbation; but it distinguished the act of enticing others to masturbate, which was customarily viewed as demonstrating a "wanton disregard for a moral standard generally and properly accepted by society".

There has hardly been a flood of novel offenses in recent years; and appellate military courts have demonstrated caution and skepticism in reviewing novel offense convictions. In United States v. Caballero,[423] for example, the Court of Military Appeals disapproved a conviction under Article 134 for "wrongful possession of narcotic paraphenalia, to-wit a syringe and needle" when such possession was not prohibited by an order or regulation. The court viewed the then-recent decision in Parker v. Levy as an implicit charge to military law not to stray far beyond the range of offenses listed in the Manual:

> In recently holding that Article 134 of the Code is not void for vagueness under the due process clause of the Fifth Amendment, a majority of the Supreme Court placed great significance upon the fact that this Court and other military authorities have considered the article in such a manner as to at least partially narrow its otherwise broad scope and to supply considerable specificity by way of examples of covered conduct. In drawing attention to the decisions of this Court as well as the more than 60 sample specifications in the Manual, a majority of the Supreme Court found a "substantial range of conduct" to which Article 134 applies" without vagueness or imprecision.[424]

The Court of Military Appeals found no case precedent for Caballero's conviction, and the offense was not listed or otherwise described in the Manual. The court rejected the government's forceful argument about the extent and severity of drug abuse in the military, and its obvious

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[423] 23 C.M.A. 304, 49 C.M.R. 594 (1975).

[424] Id., 49 C.M.R. at 596, quoting Parker v. Levy, 417 U.S. at 754.

impact on discipline, morale, and readiness. This consideration obviously was the driving force behind the court-martial's finding of guilty. Instead, the court held, as a matter of law, that mere possession of a syringe, in the absence of a lawful order prohibiting it, presented only a potential harm, not direct and palpable prejudice.[425]

Two Court of Military Review cases since Caballero demonstrate the close appellate scrutiny to which novel offense convictions are scrutinized. In United States v. Linyear[426] the Navy Court of Military Review held that calling a woman a "swine" was not an Article 134 offense, but avoided deciding the case on a novel offense basis. Instead the court treated the case as raising an issue of insufficiency of proof of the long-recognized[427] offense of communicating "indecent, insulting, or obscene language" to a female or a child. The court held that the word "swine" did not communicate the "libidinous message" that was an element of the offense.

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[425]The author suspects that the court's uncharacteristic overtuning of the court-martial's findings in Caballero may have been influenced by an understandable reluctance to expand the scope of the general articles in the first novel offense case to be decided after Parker v. Levy. The author is firmly convinced that, given the change in membership on the Court of Military Appeals since 1975 and the court's marked change in philosophy, Caballero would be decided differently today.

[426]3 M.J. 1027 (N.C.M.R. 1977), petition for review denied, 5 M.J. 269 (1978).

[427]See Table of Maximum Punishments, M.C.M. 1969 (Rev.), para. 127c, at 25-16.

The Army Court of Military Review, in United States v. Regan,[428] considered a conviction under Article 134 for throwing butter on a mess-hall ceiling, to which the accused had pled guilty. On appeal he contended that his guilty plea was improvident because the specification did not allege an offense under the Code.[429] After noting that butter throwing was not an offense mentioned in the Manual or recognized by case precedent, the court held that there was insufficient evidence of prejudice to good order and discipline to sustain the conviction. The court believed that such a holding was compelled Parker v. Levy, which "emphasizes that the conduct prosecuted must be recognized readily as being criminal and must have a direct and immediate adverse impact upon discipline."[430] Judge Lewis vigorously dissented, arguing that under the circumstances of the case there could be no possible legitimate explanation for the accused's acts.[431]

In United States v. Evans,[432] however, the Army Court of Military Review had no difficulty in approving the

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[428] 11 M.J. 745 (A.C.M.R. 1981).

[429] For some unknown reason the trial counsel amended the specification, which originally alleged disorderly conduct under Art. 134, by deleting all the words necessary to plead disorderly conduct, but without substituting any other words importing criminality.

[430] Id. at 746.

[431] Id. at 746-47 (Lewis, J., dissenting).

[432] 10 M.J. 829 (A.C.M.R. 1981), petition for review denied, 11 M.J. 348 (1981).

accused's Article 134 conviction for setting fire to a toilet seat in an occupied barracks. Such conduct sufficiently affected the "condition of tranquility, security, and good order and discipline.[433] Evans' misconduct was therefore a distinct, lesser-included offense of simple arson, which is prohibited by Article 126.

In summary, custom continues to serve as a source of substantive law under the general articles as the military courts, from time to time, recognize new offenses. Custom can limit the application of the general articles in situations where the extent of prejudice, service discredit, or compromise of one's position as an officer is slight; but it also provides a source of hitherto unknown general articles offense. Characterizing the issue of prejudice, discrediting tendency, or unbecoming nature in the accused's misconduct as a factual issue decided at trial has restored the court-martial to its central role as the arbiter of what conduct falls under the general articles. The renewed role of the court-martial in determining, as a factual matter, the applicability of the general articles to a specific case has been balanced, especially since Parker v. Levy, by close appellate scrutiny of novel offense convictions. Overall, however, the principal effect of custom in general articles law under the Uniform Code has been to

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[433] Id. at 830, citing United States v. Snyder, 1 C.M.A. 423, 4 C.M.R. 15 (1952)

retain a nineteenth century fluidity to the substantive scope of Articles 133 and 134.

## V. CONCLUSIONS

When the role of custom in military law is viewed in a historical perspective, many of the fundamental assumptions made about the general articles are called into question. As this thesis was intended to suggest, the true meaning and nature of the general articles can only be fully understood in light of the 800 years of legal evolution they incorporate into the Uniform Code of Military Justice.

Since 1951 military courts have frequently asserted that "the General Article is not... a catchall".[434] Yet the historic purpose of military common law, to punish conduct violative of customary notions of discipline and personal behavior, speaks eloquently that the general articles were indeed, intended to be catchalls, to preserve under the codal systems of military law the ancient prerogative of the court-martial to define and punish misconduct according to the customs of the service.

Much of the misunderstanding of the role of custom in general articles law today results from the two distinct meanings and functions of custom in contemporary military law. The view of custom underlying Parker v. Levy is

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[434] United States v. Sadinsky, 34 C.M.R. at 345.

clearly legal custom, which has generally had a limiting effect on the reach of the general articles. However, to the extent that reliance on legal custom has resulted in certain conduct being characterized as per se prejudicial, unbecoming, or service-discrediting, notwithstanding the circumstances of each case, legal custom has also extended the reach of the general articles to cases that perhaps would not have resulted in convictions under nineteenth century practice.

The function of societal custom is more basic to the development and operation of the general articles and is more frequently overlooked or misunderstood. Having returned to the historic practice of treating the question of whether the accused's conduct was prejudicial, service-discrediting, or unbecoming as a factual issue for the court-martial to decide, modern court-martial members have resumed their nineteenth century roles, which Chief Judge Everett has described as "the ultimate arbiters of what is service discrediting or prejudicial to good order."[435]

It is the ability of courts-martial to give legal effect to societal custom and, in common law fashion, to apply it to new factual contexts that provides the elasticity that has long been characteristic of general articles law. To the extent that societal custom allows the recognition of new offenses under Articles 133 and 134, it is

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[435]Everett, supra note 22, at 154.

hardly the limiting or narrowing force that Justice Rehnquist assumed it to be in Parker v. Levy. Indeed, Justice Rehnquist seems to have overlooked the societal aspect of service custom entirely.

In his dissent in Parker v. Levy, Justice Stewart insightfully pointed out the inherent ineffectiveness of custom in defining and restricting the substantive scope of the conduct they prohibit. To rely on legal custom, as embodied in the Manuals, treatises, and case precedent, is to rely on explanations of military common law that are themselves frequently generalized and vague. The invocation of societal custom, which in Dynes v. Hoover was considered to be "well known by practical men in the navy and army,"[436] may now involve giving legal effect to values and norms no longer generally known and invariably observed by those supposedly subject to their operation.[437] Times and the character of military society change. As Justice Stewart mused:

> It might well have been true in 1858 or even 1902 that those in the armed services knew, through a combination of military custom and instinct, what sorts of acts fell within the purview of the general articles. But

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[436] Dynes v. Hoover, 61 U.S. (20 How.) at 82, quoted in Parker v. Levy, 417 U.S. at 747.

[437] Davis, supra note 15, at 11. The issue is not merely one involving the discontinued observance of an antique custom, such as not selling liquor to the Indians, which, after long disuse loses its legal effect at common law. Rather, there is a more fundamental question about the continued utility and fairness of predicating criminal liability on violations of societal customs of the service.

> times have surely changed. Throughout much of this country's early history, the standing army and navy numbered in the hundreds. The cadre was small, professional, and voluntary. The military was a unique society, isolated from the mainstream of civilian life, and it is at least plausible to suppose that the volunteer in that era understood what conduct was prohibited by the general articles... To presume that Levy and others like him who served during the Vietnam era were so imbued with the ancient traditions of the military as to comprehend the arcane meaning of the general articles is to engage in an act of judicial fantasy.[438]

In a similar vein, Edward F. Sherman, one of the most thoughtful commentators on modern military law, has questioned the continued validity of the separate society rationale to the extent that it permits criminal liability to be determined by the court-martial's perception of service custom:

> In a day when most servicemen will not see combat, when substantial numbers of servicemen live off post and lead a nine-to-five military existence, and when even in combat such qualities as initiative, creativity, and intelligent reaction have replaced the old standard of blind obedience to orders, military emphasis on obedience to a rigid and unspecified code of conduct administered by commanders with criminal sanctions has been subjected to question.[439]

Moreover, Sherman doubts that a consensus about concepts such as "conduct unbecoming an officer and a gentleman" still exists within the military community.[440]

The antiquity of military common law does not compel

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[438] Parker v. Levy, 417 U.S. at 781, 782 (Stewart, J., dissenting).

[439] Sherman, supra note 19, at 79-80.

[440] Id. at 81.

its continued use in American military justice. Alternatives to the general articles are available and, to a considerable extent, are already being employed. Most of the crimes and offenses now prosecuted under the general articles, such as those listed in the Table of Maximum Punishments in the Manual, could be enacted as additional punitive articles without enlarging the Uniform Code beyond manageable proportions. Others could be covered by the promulgation of general orders tailored to meet the special needs of each service.[441] In view of the wide range of administrative separation from the service, there appears to be little compelling need to prosecute noncriminal acts as unbecoming conduct under Article 133. Conduct that violates another punitive article of the Code could still be prosecuted without Article 133, provided there is sufficient service connection to allow the exercise of court-martial jurisdiction over the offense.[442]

Repealing the general articles would, however, bring an end to the role of the court-martial in determining what conduct is offensive to military common law and in

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[441] The Navy and Marine Corps now prosecute virtually all drug offenses under Art. 92, U.C.M.J., as violations of Art. 1151 of Navy Regulations. Art. 1151 incorporates the substantive provisions of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. sec. 801 et seq.

[442] In modern court-martial practice, an Art. 133 charge is almost always one of several charges arising out of a single criminal transaction, and is therefore multiplicious for sentencing.

recognizing new offenses. Indeed, it would appear that the only meaningful argument for retaining the general articles is to preserve the flexibility that service custom imparts to military law. Whether the "practical men" of the court-martial, drawing on their experience and knowledge of military custom, should continue to thus define and punish hitherto unprecedented threats to discipline, reputation, or decorum is an issue that strikes at the heart of the separate society tradition.

For 800 years custom has been essentially an expansive force in military common law, providing a flexibility to military justice that has traditionally been assumed necessary to preserve discipline. In the past thirty years, however, there has been a marked judicialization and, despite howls of protest from some corners of the military community, a civilianization of military law. No longer is the court-martial a committee of line officers meeting on the frontier or at sea, with little or no substantive or procedural legal guidance. Instead, the modern court-martial is strikingly similar, in both form and substance, to a civilian criminal trial--complete with lawyer prosecutors and defense counsels, formal rules of evidence patterned closely after the Federal Rules of Evidence, and an independent military judge. In light of these altered historic circumstances, does the unarguable need for flexibility in maintaining discipline necessarily still require a system of military common law offenses that are defined

ultimately by service custom?

The separate society is more than just judicial habit or a convenient rationalization for a "hands-off" judicial predisposition toward military issues. It also reflects the way that military people perceive themselves and their institution. But must the separate society and its legal system necessarily also be fundamentally different? Notwithstanding the attractiveness of the separate society tradition, this remains the great unanswered question confronting modern military law.

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